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CHALLENGING TEXTUAL INTERPRETATION IN MULTILINGUAL LEGAL SYSTEMS

Pascal ***Pichonnaz****

By presenting the Swiss approach to statutory interpretation, ie the pragmatic pluralism of methodologies, this paper underlines that this is a good way for the judge to take into account a basic principle: different cultures, different languages produce different texts. Since the same idea cannot be expressed in the same way in different languages, one cannot stick to the wording in order to find the common meaning of all these various wordings. More visible in multilingual legal regimes, this principle applies, however, also to monolingual systems. It is not possible to stick to a "clear" wording without a proto-interpretation of such wording through which the judge weighs all the approaches in order to get to a solution that reflects the underlying normative values.

To start a Law Journal in English in France might be seen as bold, even foolhardy. 'French law expresses itself best in French', one might say. Does this mean that this Law Journal will have to address only international and comparative issues, since English might sound appropriate only for those issues? Well, certainly not. English is not necessarily the main language when it comes to official languages in Europe. With 24 official languages[1] and 27 legal systems, Europe has been often called a world of translations.[2] To this translation mechanism in Europe, one must add the transposition of concepts and whole directives from European into domestic law. Indeed, transposing directives into the domestic law of member States requires to look at the aim pursued by an EU provision to get a similar result,

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1. Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 55 para. 1: '1. This Treaty, drawn up in a single original in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States.'
2. F. Ost, *Traduire. Défense et illustration du multilinguisme* (Fayard, coll. 'Ouvertures' 2009) 401: '(…) la langue de l'Europe, c'est la traduction'. See also Nicolas Levrat, who goes further than translation in N. Levrat, 'Le droit européen: de la traduction assistée au métissage' in A. Vailleux and others (eds), *Traduction et droits européens: enjeux d'une rencontre, Hommage au Recteur Michel van de Kerchove* (Presses de l'Université Saint-Louis 2009) 492: '(…) La langue de l'Europe du droit n'est pas la traduction, mais le métissage'.

even while using a different wording. Given this legal background, one may wonder whether it is then sensible to consider that a judge may start any interpretation with the text. In other words, what does it really mean to use a literal or textual interpretation, when the goal of such interpretation process is to ensure that the aim of an EU Directive is achieved?

If each word is haunted by pre-existing meanings, as Derrida might have said,[3] is it really possible to purposefully begin any interpretation with a text (*interprétation grammaticale*), when the goal is to achieve a certain *result*, ie the alignment of domestic statutes with what is expected through an EU Directive? At the same time, though, legislators and judges express themselves through texts, which means that one has to start any hermeneutical process from such texts. In view of this, how should one proceed? As a Swiss lawyer, I will start with a presentation of how a Swiss judge deals with such Gordian knot, given that Swiss law has to deal with four official languages, though mainly three play a role (I.). I will try then to draw some benefits from this analysis for monolingual systems using English as a non-official language (II.).

I. The Swiss experience with the pragmatic pluralism of methods

1. From 'clear text' to pragmatic pluralism

Switzerland is a multilingual state. Pursuant to Article 70 para. 1 of the Federal Constitution, '*the official languages of the Confederation are German, French and Italian. Romansh is also an official language of the Confederation when communicating with persons who speak Romansh*'. Based on this constitutional provision, the Federal Parliament adopted in 2007 a federal 'Act on Languages and Understanding between Linguistic Communities'.[4] This statute deals with many aspects of the use of languages. Article 5 of the Act on Languages states that '*Official languages of the Confederation are German, French and Italian. Romansh is the official language for relations with persons of this language*'. This means that acts adopted on the federal level are published at least in German, French and Italian.[5] Pursuant to Article 14 of the Publications Act,[6] '*publication takes place simultaneously in the official languages German, French and Italian. In the case of enactments, the three versions are equally binding*'.[7] The principle that all three official versions have equal authority has been

3. J. Derrida, *Force de loi (*Galilée 1994) 68: '[L]e texte est hanté par (…) une quasi-logique du fantôme qu'il faudrait substituer, parce qu'elle est plus forte qu'elle, à une logique ontologique de la présence'.
4. This Act has not been translated into English, but the exact title in French reads as follows: '*Loi fédérale du 5 octobre 2007 sur les langues nationales et la compréhension entre les communautés linguistiques (Loi sur les langues, LLC)*' in force since 1st January 2010, Federal classified compilation N° 441.1, hereafter 'Languages Act'.
5. Some important Acts are also published in Romansh according to Art. 11 para. 2 Languages Act and Art. 14 para. 5 Publications Act (Federal classified compilation N° 170.512, but this version is not binding according to Art. 14 para. 1 Publications Act. See P.-H. Steinauer, Traité de droit privé suisse, vol II/1 – *Le Titre préliminaire du Code civil* (1st edn, Helbing Lichtenhahn Verlag 2009) para. 263.
6. Art. 14 para. 1 Publications Act: 'La publication a lieu simultanément dans les langues officielles que sont l'allemand, le français et l'italien. Dans le cas des actes, les trois versions font foi.'
7. Federal Act on the Compilations of Federal Legislation and the Federal Gazette (Publications Act, PublA) of 18th June 2004, Systematic Collection 170.512.

confirmed by decisions of the highest Court of Switzerland, the 'Federal Tribunal'.[8] This, however, does not mean that an Italian-speaking judge in the Canton of Ticino will be allowed to refer only to the Italian version of a Federal Act, or that a German-speaking judge in Zurich will refer only to the German version. Indeed, equal authoritativeness of the various linguistic versions means that whatever the official language of the proceedings is, all three versions of a given Act have to be taken into account.[9] The Federal Tribunal has sometimes expressed this by saying that '*if the three versions do not agree, the meaning must be determined by means of interpretation, and only then can it be determined which version expresses it most clearly*'.[10] It is not infrequent for the Federal Tribunal to compare the three language versions and decide at the end that the German, the French or the Italian version (better) reflects the meaning of the specific provision.[11] It does so sometimes after an analysis of the purpose of a provision.[12]

Given, however, that each canton shall decide which language is its official language(s) in accordance with the principle of territoriality (see Article 70 para. 2 Fed. Cst.), procedures in most cantons run in only one language. Indeed, the choice of the cantonal official language is not arbitrary, but should guarantee the territorial stability of languages, the so-called principle of territoriality, which is particularly important where there is a need to

8. See DFT [Decision of the Federal Tribunal] 140/*2014* II 495 reason 2.3.1: 'Ausgangspunkt der Auslegung eines Gesetzes bildet der Wortlaut der Bestimmung (grammatikalisches Element). Bei Erlassen sind die Fassungen in den *Amtssprachen* Deutsch, Französisch und Italienisch in gleicher Weise verbindlich (Art. 14 Abs. 1 des Bundesgesetzes vom 18. Juni 2004 über die Sammlungen des Bundesrechts und das Bundesblatt [PublG; SR 170.512)]. Stimmen die drei Fassungen nicht überein, ist auf dem Wege der Auslegung der Sinn zu ermitteln, woraus sich erst ergibt, welche Version ihn am klarsten ausdrückt (BGE 135 IV 113 E. 2.4.2 S. 116; BGE 134 V 1 E. 6.1 S. 2; BGE 126 V 435 E. 3 S. 438)'; DFT 148/*2022* II 556, reason 3.4.1; Decision of the FT, 2C_876/2020 (13.09.2022), reason 3.2.2; Decision of the FT, 2C_469/2015 (22.02.2016), reason 3.2.1; DFT 127/*2001* V 160; DFT 126/*2000* V 206; DFT 125/*1999* III 57/58 reason 2b.
9. B. Schnyder, '*Dreisprachigkeit des ZGB: Last oder Hilfe?*' in *Mélanges en l'honneur de Henri-Robert Schüpbach* (Helbing & Lichtenhahn 2000) 37; cf Steinauer (n 5) para. 264.
10. DFT 140/*2014* II 495 reason 2.3.1: 'Stimmen die drei Fassungen nicht überein, ist auf dem Wege der Auslegung der Sinn zu ermitteln, woraus sich erst ergibt, welche Version ihn am klarsten ausdrückt'.
11. See for some examples, DFT 127/*2001* III 548, reason 3, 551: '(…) Selon la version allemande du premier alinéa de la norme en cause, *in initio*, la demeure du locataire en retard pour s'acquitter d'un terme ou de frais accessoires échus intervient "nach der Übernahme der Sache". La version française de l'art. 257d al. 1 CO parle de "réception de la chose", alors que la version italienne indique "dopo la consegna della cosa". *C'est la teneur italienne de la disposition qui doit être préférée, où il est question non pas de la réception (Übernahme), mais bien de la remise (consegna) de la chose*'; FT, Decision 4A_362/2017 (26 October 2017), reason 3.6: '3.6. Nach der Bestimmung von Art. 109 Abs. 2 lit. b ZPO kann das Gericht von der Kostenregelung der Parteien abweichen, wenn "die getroffene Regelung einseitig zulasten einer Partei geht, welcher die unentgeltliche Rechtspflege bewilligt worden ist" ("elle défavorise de manière unilatérale la partie au bénéfice de l'assistance judiciaire" bzw. "la ripartizione pattuita grava unilateralmente una parte cui è stato concesso il gratuito patrocinio"). Für die Abweichung von der Kostenvereinbarung der Parteien wird damit nach dem deutschen und italienischen Wortlaut zunächst vorausgesetzt, dass der durch die Kostenregelung benachteiligten Partei die unentgeltliche Rechtspflege bewilligt bzw. gewährt ("concesso") wurde. *Diese also – wie es in der französischen Fassung der Norm heisst – von der unentgeltlichen Rechtspflege profitiert ("partie au bénéfice").*'; FT, 6B_438/2013 (18 July 2013), reason 2.1: '(…) Contrairement à la version française, les versions allemande et italienne opèrent une distinction entre la partie plaignante ("Privatklägerschaft"; "accusatore privato") et le plaignant ("antragstellende Person"; "querelante"). Ainsi la condition d'avoir agi de manière téméraire ou par négligence grave et de la sorte entravé le bon déroulement de la procédure ou rendu celle-ci plus difficile ne s'applique qu'au plaignant. En revanche, cette condition ne s'applique pas à la partie plaignante à qui les frais peuvent être mis à charge sans autre condition.'
12. See esp. FT, Decision 4A_362/2017 (26.10.2017) in which reason 3.5, dealing with the language versions, follows reason 3.4, dealing with the purpose of the provision.

protect language minorities, especially in territories in which they are endangered.[13] Thus, in four cantons (Vaud, Neuchâtel, Geneva and Jura) French is the official language; all cantonal acts are adopted in French, the administration interacts with citizens in French and proceedings are also normally conducted in French. Seventeen cantons use German as their official language. For those cantons, the official language is the so-called 'High German' or 'written German'. The Swiss-German dialects are not official languages;[14] they are mainly oral dialects, which have no standardised written forms, so it would be difficult to use them as official languages. However, if all parties agree, Swiss-German is sometimes used in court, since less educated parties will feel more comfortable speaking in the Swiss German dialect rather than in 'High German'. In one canton, Ticino, Italian is the official language. Three cantons are bilingual German/French (Bern,[15] Fribourg,[16] and Valais[17]) and one is trilingual German, Italian and Romansh (Graubünden)[18]. In those cantons, statutes are adopted in two (or three for Graubünden) equally valid linguistic versions.

As a result, a court in Geneva will normally cite only the French version of a Federal Act, but might need to consider the German and/or the Italian version to reinforce the understanding of a specific provision. Thus, all three linguistic versions are supposed to play a role in the interpretation of a statute, but the judge will normally express the specific provision only in one language, the official language of the forum.

Despite the variety of official languages both on cantonal and federal levels, the Federal Tribunal has used the old principle that '*in claris cessat interpretatio*', ie, if the wording is clear there is no need for more interpretation, for decades, at least since the sixties.[19] The Federal Tribunal used to say that 'the clear, ie unequivocal and unambiguous wording may only be deviated from in exceptional cases, namely if there are good reasons to believe that the wording does not reflect the true meaning of the provision'.[20] A similar formula can be found in more recent cases: 'A statute is interpreted first and foremost according to its wording. According to case law, there is no reason to depart from the literal meaning of a clear

13. P. Mahon, 'Article 70' in Bernhard Ehrenzeller and others (eds), *Die schweizerisches Bundesverfassung – St. Galler Kommentar* (Dike Verlag (in cooperation with Schulthess) 2023) 9; E.M. Belser and B. Waldmann, 'Article 70' in B. Waldmann, E.M. Belser, A. Epiney (eds), *Basler Kommentar – Schweizerisches Bundesverassung (BV)* (Helbing Lichtenhahn 2015) 27 and 30.
14. For more detail on this issue, see E.M. Belser and B. Waldmann (n 13) 7 and 19; see also Message of the Federal Council on the Revision of Art. 116 Constitution, FF 1991 II 338 (German version).
15. See Art. 6 para. 2 Constitution of Bern of 6th June 1993, Federal classified compilation N° 131.212.
16. See Art. 6 para. 1 Constitution of Fribourg of 16th May 2004, Federal classified compilation N° 131.219.
17. See Art. 12 para. 1 Constitution of Valais of 8th March 1907, Federal classified compilation N° 131.232.
18. See Art. 3 para. 1 Constitution of Graubünden of 14th September 2003, Federal classified compilation N° 131.226.
19. On this long established principle, see C. Schott, '"Interpretatio cessat in claris" – Auslegungsfähigkeit und Auslegungsbedürftigkeit in der juristischen Hermeneutik' in J. Schröder (eds), *Theorie der Interpretation vom Humanismus bis zur Romantik – Rechtswissenschaft, Philosophie, Theologie* (Franz Steiner 2001); D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter* (6th edn, C.H. Beck 1998) C 116; for a modern account, see among others, P. Pichonnaz, 'Le centenaire du Code des obligations' (2011) 130, II, Revue de droit suisse, at 117ff, esp. at 206.
20. Free English translation from the original German version: DFT 127/*2001* V 1 reason 4a 'Vom klaren, d.h. eindeutigen und unmissverständlichen Wortlaut darf nur ausnahmsweise abgewichen werden, unter anderem dann nämlich, wenn triftige Gründe dafür vorliegen, dass der Wortlaut nicht den wahren Sinn der Bestimmung wiedergibt'.

text by way of interpretation unless there are objective reasons to believe that the text does not convey the true meaning of the provision in question'.[21]

Even though some 'new' cases still use a similar formula,[22] the Federal Tribunal modified its approach around mid-1990 by declaring it would be using a pragmatic pluralism of methods (*pragmatischer Methodenpluralismus*,[23] *pluralisme pragmatique de méthodes*). In a free English translation from the original German expression of such methodology, one could say that the Federal Tribunal affirms the following:[24]

> A statute must first and foremost be interpreted on its own merits, ie according to its wording, meaning and purpose and the underlying evaluations on the basis of a teleological method of understanding. The interpretation of the law must be guided by the idea that it is not the wording alone that constitutes the norm, but only the law understood and concretised through the facts. What is required is the factually correct decision in the normative structure, oriented towards a satisfactory result of the *ratio legis*. In doing so, the Federal Tribunal follows a pragmatic pluralism of methods and refuses to subject the individual elements of interpretation to a hierarchical order of priority.

Thus, even if it starts with the wording, the Federal Tribunal considers it necessary to examine all other elements of interpretation to be then able to find which interpretation might give the most appropriate result, including for the concrete case at hand. Thus, there is no preestablished hierarchy between the literal, the systematic, the historic or the teleological interpretation, as long as the pragmatic approach results in a solution that reflects a meaning that is satisfactory and equitable in general, but in particular also for the case at hand. As to what the standard of an 'equitable solution' is, the reader is left without any specific indications. No decision by the Federal Tribunal gives any guidance on it. Only a careful analysis of each case may identify some underlying principles of justice.[25]

This approach is in line with Article 1 para. 1 Swiss Civil Code (SCC), which provides for the application of the law and reads as follows, in a free English translation: 'The law applies according to its wording or interpretation to all legal questions as to which it contains a provision'. As one can see, the drafter of the Swiss Civil Code, Eugen Huber, did not write

21. Free English translation from the original French version: DFT 132/*2006* III 226 reason 3.3.5 'La loi s'interprète en premier lieu selon sa lettre. Selon la jurisprudence, il n'y a lieu de déroger au sens littéral d'un texte clair par voie d'interprétation que lorsque des raisons objectives permettent de penser que ce texte ne restitue pas le sens véritable de la disposition en cause'.
22. See also further cases DFT 135/*2009* III 640 reason 2.3.1; DFT 135/*2009* IV 113 reason 2.4.2; DFT 135/*2009* V 1 reason 7.2; on this see also E. A. Kramer, *Juristische Methodenlehre* (6th edn, C.H. Beck 2019) 95ff; F. Werro, 'Article 1' in P. Pichonnaz and B. Foëx (eds), *Commentaire romand – Code civil I* (1st edn Helbing Lichtenhahn 2010) para. 1 and 6ff.
23. DFT 136/*2010* III 283 reason 2.3.1; DFT 136/*2010* III 23 reason 6.6.2.1; DFT 136/*2010* II 187 reason 7.3.
24. DFT 131/*2005* III 33 reason 2: 'Das Gesetz muss in erster Linie aus sich selbst heraus, das heisst nach dem Wortlaut, Sinn und Zweck und den ihm zugrunde liegenden Wertungen auf der Basis einer teleologischen Verständnismethode ausgelegt werden. Die Gesetzesauslegung hat sich vom Gedanken leiten zu lassen, dass nicht schon der Wortlaut die Norm darstellt, sondern erst das an Sachverhalten verstandene und konkretisierte Gesetz. Gefordert ist die sachlich richtige Entscheidung im normativen Gefüge, ausgerichtet auf ein befriedigendes Ergebnis der ratio legis. Dabei befolgt das Bundesgericht einen pragmatischen Methodenpluralismus und lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen (BGE 128 I 34 E. 3b S. 40 f.)'.
25. For such an attempt to identify the grounds of equity in a tax law case, see eg H. Torrione, 'Justice distributive aristotélicienne en droit fiscal selon la jurisprudence du TF – Une étude de philosophie du droit sur la notion de "Sachgerechtigkeit"' (2010) 129, I, Revue de droit suisse 131-61.

'wording and interpretation' but 'wording *or* interpretation'. When one looks at the three linguistic versions, the difficulty of adhering to the wording becomes also more apparent:

> Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach *Wortlaut oder Auslegung* eine Bestimmung enthält.
> La loi régit toutes les matières auxquelles se rapportent *la lettre ou l'esprit* de l'une de ses dispositions.
> La legge si applica a tutte le questioni giuridiche alle quali può riferirsi *la lettera od il senso* di una sua disposizione.

It is obvious that 'Auslegung' should have been translated into French by 'interprétation' (interpretation) instead of 'l'esprit' (spirit), and the Italian 'senso' is closer to 'meaning' than 'interpretation'. However, the choice of words in each language is not innocent and refers to some preunderstandings. This is particularly clear with 'l'esprit', which is haunted by Montesquieu and his 'L'esprit des lois'.[26]

So, wording in a system in which three language versions are equally authoritative cannot be 'trusted' at its 'face value'. The interpreter, ie the judge, has to consider the wording as a gate to something more profound, a meaning that is both hidden in the choice of words, and transcends those words into a purpose that emanates from a whole set of factors. The interpretation transforms itself into a more dynamic process; the judge has to find the best solution in light of all the interpretative methodologies, ensuring an *equitable solution* in line mainly with the overall framework of the provision. This is a pragmatic approach, *par excellence.*

2. Between the expression of a method and its application

The Swiss Federal Tribunal has developed its methodology for almost three decades, but strangely there is no unitarian expression of it, maybe because of its pragmatic nature and the difficulty of applying a predefined roadmap.

One finds different expressions of such method, which are divided by language and by Chamber of the Federal Tribunal. The first use of the expression 'pragmatischer Methodenpluralismus' by the Federal Tribunal occurred in 1995[27] in a decision rendered in German.[28] After some explanations on the role of the judge and the separation of powers, the Federal Tribunal stated the following:

> Die Gesetzesauslegung hat sich vom Gedanken leiten zu lassen, dass nicht schon der Wortlaut die Rechtsnorm darstellt, sondern erst das an Sachverhalten verstandene und konkretisierte Gesetz. Gefordert ist die sachlich richtige Entscheidung im normativen Gefüge, ausgerichtet auf ein befriedigendes Ergebnis aus der *ratio legis*. Dabei befolgt das Bundesgericht einen pragmatischen Methodenpluralismus und

26. C. De Secondat de Montesquieu, *De l'esprit des Lois* (first published in 1758).
27. DFT 121/*1995* III 219 reason 1/d/aa.
28. Pursuant to Article 54 para. 1 Federal Tribunal Act (in an unofficial English translation), 'the proceedings are conducted in one of the official languages (German, French, Italian, Rumantsch Grischun), as a general rule in the language of the contested decision. (…)'.

> lehnt es namentlich ab, die einzelnen Auslegungselemente einer hierarchischen Prioritätsordnung zu unterstellen.[29]

One had to wait another four years to see the expression appear in a French decision by the Federal Tribunal, though used by a different Chamber.[30] The wording was also quite different, as it still relied heavily on the former understanding of the central importance of the wording:[31]

> La loi s'interprète en premier lieu selon sa lettre. Toutefois, si le texte n'est pas absolument clair, si plusieurs interprétations de celui-ci sont possibles, il faut alors rechercher quelle est la véritable portée de la norme, en la dégageant de tous les éléments à considérer, soit notamment les travaux préparatoires, le but et l'esprit de la règle, les valeurs sur lesquelles elle repose, ainsi que sa relation avec d'autres dispositions légales (*citations omitted*). Pour rendre la décision répondant de manière optimale au système et au but de la loi, le Tribunal fédéral utilise, de manière pragmatique, une pluralité de méthodes, sans fixer entre elles un ordre de priorité.

The French version declares using the same pragmatic methodology, but still starts with the idea that such methodology would apply only if the text is not absolutely clear. This creates at least in appearance a direct contradiction. Indeed, while one can understand that in a system based on codes and statutes, one has to start any analysis with a textual approach, it is never possible to stop at this initial step, given that in the Federal Tribunal's methodology, the literal interpretation has no more weight than any of the other historical, systematic or teleological approaches. Furthermore, a text can only be considered as 'clear' if it appears that the literal interpretation is in line with the other approaches. Therefore, by referring to a text as being 'absolutely clear', the Federal Tribunal must have already admitted that the literal interpretation is in line with the other approaches (at least as a kind of proto-interpretation step). There is therefore a contradiction in claiming that no interpretation is needed when the text is absolutely clear, given that a proto-interpretation must necessarily have taken place. Nevertheless, the Federal Tribunal has continued to use expressions of the pragmatic pluralism of methods referring also to the 'clear text' of a statute.[32]

The ambit of this methodology is sometimes also restricted through references to the purpose as a means to enlarge or restrict the meaning of a specific wording:

29. An unofficial translation reads as follows: 'The interpretation of the law must be guided by the idea that it is not the wording alone that constitutes the legal norm, but only the law understood and concretised through the facts. What is required is the factually correct decision in the normative structure, oriented towards a satisfactory result of the *ratio legis*. In doing so, the Federal Tribunal follows a pragmatic pluralism of methods and specifically refuses to subject the individual elements of interpretation to a hierarchical order of priority'.
30. DFT 125/*1999* II 238 reason 5.
31. An unofficial translation reads as follows: 'First and foremost, the law must be interpreted according to its letter. However, if the text is not absolutely clear, if several interpretations are possible, then the true scope of the rule must be ascertained from all the elements to be considered, in particular the preparatory work, the purpose and spirit of the rule, the values on which it is based, as well as its relationship with other legal provisions ([*citations omitted*]). The Federal Tribunal pragmatically uses a variety of methods to arrive at a decision that best reflects the system and purpose of the law, without establishing an order of priority between them'.
32. For example, DFT 127/2001 V 1/5; DFT 132/*2006* III 226 reason 3.3.5; DFT 135/*2009* III 640 reason 2.3.1; DFT 135/*2009* IV 113 reason 2.4.2; DFT 135/*2009* V 1 reason 7.2; DFT 142/*2016* II 695; DFT 142/*2016* V 368 reason 5.1; and references by E.A. Kramer, supra note 22, at 95.

> Il peut résulter d'une interprétation dans les règles de l'art qu'un texte apparemment clair soit trop large et ne puisse être appliqué à la situation qu'il envisage (restriction téléologique).[33]
> Le postulat de la force obligatoire de la loi n'exclut pas en soi, par principe, la marge de décision des juges. Il limite cependant l'admissibilité de l'élaboration du droit *contra verba* mais *secundum rationem*.[34]

Finally, a closer look also shows some discrepancies between the various Chambers of the Federal Tribunal. The two public law Chambers seem to use the expression of the pragmatic pluralism of methods (in French and in German) less often than the two private law Chambers. The criminal law Chamber also applies the expression of the pragmatic pluralism of methods, without systematically referring to the clear text of a statute, but taking into account the principle of *nulla poena sine lege*, in a formulation that is often presented as follows:

> Strafbar ist nur, wer eine Tat begeht, die das Gesetz ausdrücklich mit Strafe bedroht (Art. 1 StGB). Der Gesetzestext ist Ausgangspunkt der Gesetzesanwendung. Selbst ein klarer Wortlaut bedarf aber der Auslegung, wenn er vernünftigerweise nicht der wirkliche Sinn des Gesetzes sein kann. Massgebend ist nicht der Buchstabe des Gesetzes, sondern dessen Sinn, der sich namentlich aus den dem Gesetz zu Grunde liegenden Wertungen ergibt, im Wortlaut jedoch unvollkommen ausgedrückt sein kann. Sinngemässe Auslegung kann auch zu Lasten des Beschuldigten vom Wortlaut abweichen. Im Rahmen solcher Gesetzesauslegung ist auch der Analogieschluss erlaubt. Dieser dient dann lediglich als Mittel sinngemässer Auslegung. Der Grundsatz 'keine Strafe ohne Gesetz' (Art. 1 StGB) verbietet bloss, über den dem Gesetz bei richtiger Auslegung zukommenden Sinn hinauszugehen, also neue Straftatbestände zu schaffen oder bestehende derart zu erweitern, dass die Auslegung durch den Sinn des Gesetzes nicht mehr gedeckt wird.[35]
> Only a person who commits an act that is expressly punishable by law is liable to prosecution (Art. 1 Criminal Code). The wording of the law is the starting point for the application of the law. However, even a clear wording requires interpretation if it cannot reasonably be the true meaning of the law. It is not the letter of the law that is decisive, but its meaning, which results in particular from the values underlying the law, which may, however, be imperfectly expressed in the wording. An interpretation according to the meaning can also deviate from the wording to the detriment of the accused. Within the framework of such an interpretation of the law, the conclusion by analogy is also permitted. In this case, the analogy merely serves as a means of interpretation. The principle of 'no punishment without statute' (Art. 1 Criminal Code) merely prohibits going beyond the meaning of the law as correctly interpreted, ie creating new offences or expanding existing ones in such a way that the interpretation is no longer covered by the meaning of the law.[36]

One can see how astute this analysis of the relation between the text and the meaning of a given provision is; the principle *nulla poena sine lege* does not mean that the text must prevail over the intent and the underlying values, if those are not (correctly) reflected in the

33. DFT 145/*2019* III 109 reason 5.1.
34. DFT 140/*2014* I 305 reason 6.2.
35. DFT 128/*2002* IV 272, reason 2.
36. Free translation of DFT 128/*2002* IV 272, reason 2.

letter of a provision. In the same decision, the Federal Tribunal acknowledges, however, how difficult it might be to distinguish between a permissible interpretation of a criminal provision to the disadvantage of the accused and the impermissible creation of new criminal offences by analogy. The endeavour to actually punish a conduct worthy of punishment must not be confused or equated with the meaning and purpose of a penal provision. It underlines that it should not be overlooked that the question of whether a certain conduct falls under a criminal offence arises precisely when it appears to be punishable.[37]

In a more recent decision, the Federal Tribunal, Criminal Chamber, has gone beyond the letter of the juvenile criminal code after demonstrating that there was a gap to be filled in, based on the intent of the legislator to reproduce, in the juvenile criminal code, provisions of the 'ordinary' criminal code.[38] The Court used at this end a pragmatic pluralism of methods to better reflect the equitable solution that was being sought by the legislator.

In summary, not only does the Federal Tribunal have various versions of its central methodology of the pragmatic pluralism of methods, but the tension between this methodology and former ones based on the absolute centrality of the text creates tensions that are difficult to solve in a coherent way, especially in criminal law which applies the principle *nullum crimen sine lege*. Nevertheless, the Court has rightly considered that the pragmatic pluralism of methods does indeed has its full justification in criminal law just as in any other area, as any text requires interpretation. This is especially true when the text is expressed in various languages with ultimately several potential meanings driven from the various linguistic wordings. *The pragmatic pluralism of methods is therefore a necessary means in a pluralinguistic legal system.*

II. Facing challenges of expressing a monolingual system in English

This ambivalent perspective of any literal interpretation being both the necessary start of an interpretation and, at the same time, not predictive of the outcome, cannot only be true for a multilingual system, such as the Swiss legal regime. Monolingual systems may also need to realise that wording is haunted and that a clear text is only the result of a hermeneutical process.

However, in multilingual systems, the importance of a pragmatic pluralism of methods is more apparent, as the various language versions reveal more easily the feature that a wording cannot preempt the interpretation, as the mere literal interpretation in the various languages does often lead to different results. This cannot be different in essence when there is only one official language. Without a *tertium comparationis*, it is just more difficult to identify that feature.

This is all the truer when legal systems are expressed in non-official languages, such as in English. This will typically happen when Swiss law is the applicable law in arbitration

37. DFT 128/*2002* IV 272, reason 2: '(…) Die Abgrenzung zwischen zulässiger Auslegung einer Strafbestimmung zu Ungunsten des Beschuldigten und unzulässiger Schaffung neuer Straftatbestände durch Analogieschlüsse ist allerdings schwierig. Das Bestreben, ein strafwürdiges Verhalten tatsächlich auch zu bestrafen, darf nicht mit dem Sinn und Zweck einer Strafnorm vermengt bzw. gleichgesetzt werden. Andererseits ist nicht zu übersehen, dass sich die Frage, ob ein bestimmtes Verhalten unter einen Straftatbestand fällt, eben gerade dann stellt, wenn es als strafwürdig erscheint (BGE 127 IV 198 E. 3b S. 200)'.
38. DFT 143/*2017* IV 49, reasons 1.5-1.7.

proceedings held in English. The readers (and therefore potentially the arbitrators) will give a meaning to words according to their own cultural and legal educational background. By doing so, interpreters might misunderstand the meaning of a provision. For example, when reading the words '*essential mistake*' at Article 23 (Swiss) Code of Obligations, one must understand that the Swiss system is based on the theory of intent (*Willenstheory*) meaning that one should only be bound when the statement made reflects what was meant by the author of such statement. A *unilateral mistake* makes a statement inoperative, as long as it is considered as essential, ie as one of the triggering elements for a person to have made such statement. It does not need to go necessarily to the core of the motives, it may also be one essential element needed for the valid conclusion of a contract. This means that an 'essential mistake' pursuant to Article 23 Swiss Code of Obligations might not only be a unilateral mistake, but it can be indifferently a mistake of fact or of law, even if the statute does not say so.

An interesting example is given with the rules related to penalty clauses (Article 160 ff Swiss Code of Obligations). Article 161 Swiss Code of Obligations has been translated into English in the unofficial translation of the Federal Administration as follows: 'The penalty is payable even if the creditor has not suffered any damage'.[39] Concerned about the fact that a penalty clause is void under American law as soon as the contractual amount does not closely reflect the actual damage, and therefore anytime when it is not truly a liquidated damages clause, the Swiss-American Chamber translated Article 161 Swiss code of Obligations in an English version of 2011[40] as follows: 'Liquidated damages are due even in the event that the obligee has not suffered damage'. For a common-law reader, the latter may be more easily explainable, as penalty clauses are in this case void by definition, so it needs to be a liquidated damages clause. The provision would therefore aim at expanding the validity of liquidated damages clause to situations in which there is even no damage, ie to penalty clauses. This attempt to bring the translation close to the English reader has failed, as it superimposes two notions that are clearly distinct under Swiss law, and which are both valid, penalty clauses on the one hand and liquidated damages on the other. An interpretation of Article 161 Swiss Code of Obligations would necessarily mean understanding the underlying values of the regime, what is haunted in the provision. A mere translation cannot transmit this information easily.

This is why one has difficulties following a very affirmative statement made by Judge Posner in the *Bodum case*. The Statement reads as follows:[41]

> Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client (…) But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, all in English (if English is the foreign country's official language), to provide neutral illumination of issues of foreign law. I cannot fathom why in dealing with the meaning of laws of English-speaking countries that

39. The official versions read as follows: '[1] Die Konventionalstrafe ist verfallen, auch wenn dem Gläubiger kein Schaden erwachsen ist'; '[1] La peine est encourue même si le créancier n'a éprouvé aucun dommage.'; '[1] La pena convenzionale è dovuta sebbene non sia derivato alcun danno al creditore.' and even in Rumansh '[1] Il chasti convenziunal è scadì, er sch'i n'ha dà nagin donn per il creditur'.
40. Swiss-American Chamber of Commerce (ed.), Swiss Code of Obligations I, Contract Law (Articles 1-551), English Translation of the Official Text, 2011, Updated Edition, Zurich 2011.
41. *Bodum USA, Inc. v. La Cafetière, Inc.*, 96 U.S.P.Q.2d 1689, 621 F.3d 624 (2010), by R. Posner, at 633.

> share our legal origins judges should prefer paid affidavits and testimony to published materials.
> It is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if is a major country and has a modern legal system. Although most Americans are monolingual, including most judges, there are both official translations of French statutes into English, Legifrance, "Codes and Texts" (…). It does not justify our judges in relying on paid witnesses to spoon feed them foreign law that can be found well explained in English-language treatises and articles. I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. It is excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn. The French legal system is obviously not of that character.

Indeed, the French Civil Code or even French treatises may be translated into English, but for a foreigner not trained in such a system to 'truly' understand what those texts mean, one might need an interpreter that is able to make apparent what is hidden or what haunts the text. This is the role of a judge of such a legal system, but it might be the role of an expert for a foreign tribunal.

Since the wording does not necessarily reflect the true meaning of a statute, it is not sufficient to look at a translation of a text to understand what a provision 'truly' means. One needs therefore an interpreter that is sufficiently versed in a legal system to bring the other means of interpretation, especially the historical, systematic and teleological approaches in perspective, to determine what the proper interpretation that allows to have a just and fair solution in a given case shall be. What matters is the true meaning of a statute, which does not necessarily derive from a preset of interpretation methods.

Conclusion

This little journey into a multilingual legal system such as Swiss law has shown that the pragmatic pluralism of methodologies is a good way for the judge to take into account a basic principle: different cultures, different languages produce different texts. Since the same idea cannot be expressed in the same way in different languages, one cannot stick to the wording in order to find the common meaning of all these various wordings. There must, necessarily, be a multiplicity of approaches that should be combined. This is not new. Since the end of the time of the *École de l'exégèse*, and the fundamental works of François Gény, lawyers have understood that the wording of a statute is not its meaning. Eugen Huber, the main drafter of the Swiss Civil Code, was in epistolary contact with François Gény who once wrote to him saying that Article 1 of the Swiss Civil Code, and in particular para. 2, was a very good synthesis of his approach.[42]

42. On this see P. Pichonnaz supra note 19 in part. at 205 fn 48; on the letters between Gény and Huber, see O. Gauye, 'Lettre inédites d'Eugen Huber' (1962) 81, I, Revue de droit suisse 91ff; as well as O. Gauye, 'François Gény est-il le père de l'art. 1 al. 2 CCS' (1973) 92, I, Revue de droit suisse 271ff; see also F. Werro (n 22) 4.

What is probably new in the approach to the hermeneutical process by the Federal Tribunal is the pragmatic approach, which refuses to set a pre-defined hierarchy between elements of interpretation, as this would impair the core value of the law, which is to find an equitable solution for a specific case within a normative framework. The role of the text is no longer almighty, but it is a path full of possibilities for the interpreter. In order to determine the optimal solution, ie a solution that is just and equitable, the judge must weigh all the approaches in order to get to a solution that reflects the underlying normative values. Giving meaning to a wording may therefore sometimes mean ignoring its apparent meaning, to let the aim that can be derived from various components prevail. Rudolf von Jhering's 1877 '*Der Zweck im Recht*' already showed similar concerns. The pragmatism at the root of the Federal Tribunal's methodology may inspire some judges to rethink the relationship between the letter and the meaning, and, through it, the relationship between the legislator and the judge, in a more dynamic way.

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LEVEL PLAYING FIELD – THE MEANINGS OF A DISCOURSE JUSTIFYING THE ACTION OF THE EUROPEAN UNION

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Although the 'level playing field' argument has been used for a long time, it is now being exploited to a greater extent in a context of geopolitical recomposition. It accompanies a two-pronged approach to public action in the market economy promoted by the European Union. Internally, it is intended to justify corrective action in the internal market, whether in terms of respecting the competitive order or promoting positive integration. Externally, the 'level playing field' aims to protect the internal market by exploiting the Brussels effect to re-establish a balance between European and non-European enterprises.

The 'level playing field' expression is trendy. It has unquestionably become one of the refrains of the European Union in the 2020s. One may consider this is a consequence of Brexit, since the 'level playing field' has been mentioned several times to guide the relations between the Union and the United Kingdom after the latter's withdrawal.[1] What is obvious in particular is a 'Brussels effect', which expresses the European Union's normative will to power in its relation to the rest of the world – '*How the European Union Rules the World*', as Anu Bradford sums up in her legal bestseller.[2]

That the expression 'level playing field' is an English one is not insignificant. It is usually translated into French by '*conditions équitables de concurrence*' or '*conditions de concurrence équitables*' (equitable competition conditions). It commonly means, according to the *Cambridge dictionnary*, '*a situation in which everyone has the same chance of succeeding*'. Far from being limited to the legal field, this expression encompasses all the spheres of the economic, social and political life when players are in a competition relation. Thus, 'level playing field' is applicable to sports rules,[3] the fight against social inequality,[4] or even the virtues of a democratic regime.[5] However, it is unquestionably in the economic field that it

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1. E. Ares, D. Carver, S. Fella *et al.*, 'The EU-UK Trade and Cooperation Agreement: Level Playing Field', House of Commons Library, Briefing Paper N° 9190, 20 May 2021.
2. A. Bradford, *The Brussels Effect. How the European Union rules the World* (OUP 2020).
3. L. Francis, 'The Metaphor of a "Level Playing Field" in Games and Sports Get access Arrow' in T. Hurka, Games (ed.), *Sports, and Play: Philosophical Essays* (OUP 2019) 137-54.
4. S. Baum and M. McPherson, *Can College Level the Playing Field?: Higher Education in an Unequal Society* (Princeton University Press 2022).
5. S. Levitsky, L. Ahmad, 'Way Democracy's Past and Future: Why Democracy Needs a Level Playing Field', (2010) vol. 21, 1, Journal of Democracy 57-68.

is most used. It is true that competition between economic operators is consubstantial with the market economy. The English language maintains the confusion as '*competition*' refers in French to both '*compétition*' (competition) and '*concurrence*' (rivalry), but it will not be necessary here to distinguish between the two words. The 'level playing field' brings us from economics to the law since legal rules are necessary to guarantee the competitive operation of the market. There has been an increasing number of occurrences of the 'level playing field' in a series of Union legal acts, one of the most emblematic of which is the regulation on foreign subsidies because the latter may 'distort the internal market and undermine the level playing field for various economic activities in the Union'.[6] It is only one text among others which all lead to one question: to what extent does the 'level playing field' contribute to shape the Union legal rules?

Pursuant to Article 119 TFEU, the Union and Member States must respect the principle of the open market economy where competition is free. Upsetting words have been uttered. That principle supposedly induces an ideological bias of the Union and, because it is linked to a competitive market economy, the 'level playing field' would supposedly 'illustrate the foggy neoliberal vocabulary which is currently flooding the legal discourse, especially that which is produced by the Union'.[7] However, concluding that the discourse referring to the 'level playing field' is of a purely neoliberal nature – which must still be defined – is reductive. While that discourse has an affinity with competition rules, it does not quite coincide with them, at least in Union law. The French translation of 'level playing field' is quite revealing in that respect. What is most often at stake is equitable competition conditions, which refers in English to '*fairness*'. The notion then gets blurred, so endless are the debates – which will be carefully avoided here – that fairness raises in law and economics. What should be considered to be fair? The answer, in our sense, can only be a political one. Thus the 'level playing field' nurtures an eminently political discourse the aim of which is to found public action in a market economy designed to guarantee or restore the conditions in which the actors of the market compete so that that competition is fair.

Conducting some research in the Community acquis as consolidated in Eur-Lex is quite enlightening. Though the expression is rather old, its use significantly developed from the 2010-2020s onwards. Its first occurrences in Community law date back to the 1970s. It was initially used in a few free-trade agreements concluded by the European Economic Community and third countries. For example, the agreement entered into with the Swiss Confederation provides in its preamble that it aims to 'ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe'.[8] Article 1 stipulates that it purports to 'provide fair conditions of competition for trade between the Contracting Parties'.[9] Fair competition

6. European Parliament and Council Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market [2002] OJ L 330, 1, Rec. 4.
7. N. Pigeon, 'Extraterritorialité et level playing field' in A. Hervé, C. Rapoport (dir.), *L'Union européenne et l'extraterritorialité, Acteurs, fonctions, réactions* (Presses universitaires de Rennes 2023) 213.
8. Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300, 189.
9. ibid for the same wording: Agreement between the European Economic Community and the Republic of Austria [1972] OJ L 301, 2; Agreement between the European Economic Community and the Kingdom of Sweden [1972] OJ L 300, 97; Agreement between the European Economic Community and the Republic of Portugal [1972] OJ L 301, 165; Agreement between the European Economic Community and the Republic of Finland [1973] OJ L 328, 2.

conditions have also occasionally been mentioned in transport[10] and agricultural[11] common policies. For example, a series of regulations on the common organisation of the market in wine were driven by the necessity to establish or restore fair conditions of competition between national and imported wines.[12] In 1977, the ‘level playing field’ was mentioned for the first time in a harmonised directive accompanying the realisation of the common market in the banking sector. Indeed, the first banking directive aimed at drawing closer national legislations on the exercise of the banking activity in the common market to ensure ‘fair conditions of competition between credit institutions’.[13] Banking and finance law later became a chosen land for the ‘level playing field’.

Despite the realisation of a single market becoming an internal one, there was no development of a discourse on the level playing field in the 1980s. It was only in the 1990s that the fair conditions of competition were mentioned again as the foundation of Community action. That can be explained both by the perspective of the enlargement of the Union to Eastern and Central Europe and the implementation of the World Trade Organisation. Thus, in its Action plan for 1995, the European Commission stated it wanted to ensure a

> level playing field by taking action against restrictive agreements, concerted practices, abuse of dominant positions and mergers which are incompatible with the common market, government subsidies and exclusive rights. It will take account of the competitive challenges facing European businesses from the world market so as to keep the single market competitive and maintain competitive markets and thereby promote industrial efficiency in Europe through the free operation of market mechanisms.[14]

This shows a double dimension of the level playing field, which is at the same time internal – as it accompanies the realisation of an internal market, and external – insofar as its objective is the European Union’s relations with the rest of the world.

10. Council Proposal of decision on the establishment of a common price system for the use of transport infrastructures [1971] OJ C 62, 15; Intermediary report of the Commission to the Council on the price for use of transport infrastructures COM/1975/0493.
11. Council Proposal for a Regulation (EEC) on Community rules applicable in the matter of agricultural products to the Channel Islands and the Isle of Man (submitted to the Council by the Commission); Commission Decision of 23 March 1977 authorizing Ireland to take protective measures in respect of certain processed agricultural products under Article 135 of the Act of Accession (77/289/EEC) [1977] OJ L 97, 29.
12. Council Regulation (EEC) 2680/72 of 12 December 1972 amending Regulation (EEC) 816/70 laying down additional provisions for the common organisation of the market in wine and Regulation (EEC) 817/70 laying down special provisions relating to quality wines produced in specified regions [1979] OJ C 52; Council Regulation (EEC) 1990/80 of 22 July 1980 amending Regulation (EEC) 337/79 to take account of resinated wine (retsina) [1980] OJ L 195, 6; Council Regulation (EEC) 459/80 of 18 February 1980 amending Regulation (EEC) 337/79 on the common organization of the market in wine and Regulation (EEC) 338/79 laying down special provisions for quality wines produced in specified regions [1980] OJ L 57, 32; Council Regulation (EEC) 460/80 of 18 February 1980 amending Regulation (EEC) 352/79 authorizing the coupage of German red wines with imported red wines [1980] OJ L 57, 35. See Case C-244/80 *Pasquale Foglia v Mariella Novello* [1981], Opinion of AG Sir Gordon Slynn, *Rec.*, 3076. Council Regulation (EC) 1493/1999 of 17 May 1999 on the common organisation of the market in wine, [1999] OJ L 179, 1.
13. Council First Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions [1977] OJ L 322, 30.
14. Commission, Work programme for 1995, COM (95) 26, 10. Commission, Action programme and timetable for the implementation of the initiatives announced in its communication of 14 September 1994 entitled ‘Industrial competitiveness policy for the European Union’, COM (95) 87, Appendix B/12.

That double dimension is present first in the decision-making process of the Commission which refers to the notion of fair conditions of competition not only, and mainly, in anti-dumping law, but also, though to a lesser extent, in State-aid law. Then, and that is where the evolutions have been the most interesting, depending on the fields of Community action, the level playing field has been used to justify the measures of positive integration that were adopted in accordance with common policies – agriculture, fishing and transport – and the harmonisation necessary to the realisation of the common market (banking and financial services, free movement of workers, consumer protection, etc.), which insisted more on the external dimension in some policies (fishing and transport) and on the internal one in others, especially those relying on harmonising directives. For example, the harmonising directives on excise duties were sometimes presented as purporting to 'prevent distortions of competition, and thus also to bring about a level playing field in sectors of economic activity where excise duties are levied'.[15] In the transport sector, the expression 'level playing field' was used in particular in the 1990s and 2000s, especially in external relations.[16] The Commission for example stated that the policy in the transport sector was 'based on the free market and fair conditions of competition'[17] while the Council agreed that 'the European transport system [developed] under fair conditions of competition'.[18] Starting from the 2000s, the discourse on the level playing field accompanied the opening up to competition of some sectors, like that of energy since '[to improve] the functioning of the market remain, notably concrete provisions are needed to ensure a level playing field'.[19] Indeed, as the Commission underlined, '[t]he liberalisation of markets in general and the establishment of a level playing field between various operators may have positive effects for competition within the European Union'.[20]

It was only at the end of the 2010s that the use of 'level playing field' significantly increased in the legal acts of the Union. Thus, there is a reference to the conditions of fair competition in a recital of some texts adopted in the mid-2010 without it having any special

15. Case C-240/01 *Commission v Germany* [2003] ECR I-4733, Opinion of AG Geelhoed, para 53.
16. European Parliament and Council Regulation (EC) Nº 785/2004 of 21 April 2004 on insurance requirements for air carriers and aircraft operators [2004] OJ L 138, 1, Rec. 3: 'Common action is necessary to ensure that these requirements also apply to air carriers from third countries in order to ensure a level playing field with Community air carriers.' See also Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area [2006] OJ L 285, 3: 'Recognising the integrated character of international civil aviation and desiring to create a European Common Aviation Area (ECAA) based on mutual market access to the air transport markets of the Contracting Parties and freedom of establishment, with equal conditions of competition, and respect of the same rules – including in the areas of safety, security, air traffic management, social harmonisation and environment'. Euro-Mediterranean aviation agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part [2006] OJ L 386, 57: 'desiring to ensure a level playing field for air carriers'.
17. Commission Resolution on communication 'Towards a new maritime strategy' COM (96)0081 [1997] OJ C 150, 52(B).
18. Council Resolution of 19 June 1995 on the development of rail transport and combined transport, [1995] OJ C, 1.
19. European Parliament and Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] OJ, 57, Rec. 2.
20. State aid Nº C 16/2005 (ex N232/2004) Envisaged sale of the Tote to the Racing Trust Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2005], OJ C 168, 41 para 62. See also Council Resolution of 7 February 1994 on the development of Community postal services [1994], OJ C 48, 3, on the fair competition conditions ensured among universal service providers and other operators.

meaning.[21] To give a rough estimate, in the 2020-2022 period, there were thirty legislative acts (regulations and directives), two decisions on the signature of international agreements, two decisions in the field of the CFSP, two decisions of the CBE and four recommendations of the European Systemic Risk Board. One should add fourteen delegated regulations and three implementing regulations of the Commission.[22]

Should this be considered as a stepping up of the discourse on the level playing field or a simple fad, or, on the contrary, is it possible to see it as a real evolution of the action of the Union? That discourse could reveal a paradigm shift in the conception, in Union law, of the open market economy where competition is free. On the one hand, the level playing field is being sought in the internal market in order to establish fair competition conditions between the economic actors, which means that the only play of competition rules is not enough and that public intervention on the market is therefore necessary. On the other hand, time for blind or even naive faith in the virtues of global free trade is over, and there is now a will to guarantee a level playing field among European and third-country companies.

This contribution offers to study the discourse on the level playing field produced by the institutions of the Union, which reveals justifying virtues. Far from meaning a market economy spontaneously producing a competition code, the level playing field is mainly referred to to justify public action in a market economy which, depending on the perspective, purports to correct (I) or protect (II) the internal market.

I. Corrective action in the internal market

Intuitively, a first type of discourse anchors the level playing field in internal market law.[23] One may reasonably understand that a space without internal borders where goods, people, services and capital move freely according to a fair competition regime presupposes a level playing field among economic actors. Quite strangely, there is almost no discourse on the level playing field when freedom of movement is mentioned. There is at most one instance in a document where it was presented by the Commission as retrospectively explaining the

21. See for example Commission Regulation (EU) N° 1137/2014 of 27 October 2014 amending Annex III of Regulation (EC) N° 853/2004 of the European Parliament and of the Council as regards the handling of certain offal from animals intended for human consumption [2014] OJ L 307, 28, Rec. 6: 'To promote better regulation and competitiveness a high level of food safety must be maintained, while offering a level-playing field for operators, which is also sustainable for small and medium-size slaughterhouses'. European Parliament and Council Regulation (EU) 2018/848 of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) N° 834/2007 [2018] OJ L 150, 1, Rec. 85: 'Small farmers and operators that produce algae or aquaculture animals in the Union individually face relatively high inspection costs and administrative burdens linked to organic certification. A system of group certification should be allowed in order to reduce the inspection and certification costs and the associated administrative burdens, strengthen local networks, contribute to better market outlets and ensure a level playing field with operators in third countries.'
22. Decisions on State aid and implementing regulations on anti-dumping are not taken into account.
23. European Parliament and Council Directive (EU) 2018/957 of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] *OJ* L 173, 16, Rec. 1 'The freedom of movement for workers, freedom of establishment and freedom to provide services are fundamental principles of the internal market enshrined in the Treaty on the Functioning of the European Union (TFEU). The implementation and enforcement of those principles are further developed by the Union and aim to guarantee a level playing field for businesses and respect for the rights of workers'.

'new approach to technical harmonisation and standards' for the free movement of goods.[24] There are many more mentions of the level playing field, on the contrary, in competition law (A) or when a normative action of the Union is to be founded (B).

A. An ambiguous relation with competition law

If one understands level playing field as meaning fair competition conditions, it necessarily has special affinity with competition law. There are two types of discourse according to that reading.

A competition doctrine of the level playing field. A first perspective consists in retaining a consubstantial relation between competition law and the level playing field. It is obvious in a whole series of opinions of Advocate General Kokott who suggests a real competition doctrine of the level playing field. The latter indeed takes on an ontological meaning in the opinions of the advocate general who does not hesitate to call it 'The fundamental aim of uniform conditions of competition for all undertakings operating in the internal market'.[25] Her opinion also insists on 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ("level playing field")'[26] and refers to her conclusion in which she makes a list of references to the principle, which is described on different levels.

On the substantial level, 'One of the basic conditions for the development of effective competition on a market is the ensuring of fair conditions of competition as between the various operators'[27] and 'European competition law must rather be interpreted and applied in such a way that, as a result of a uniform legal framework, equivalent conditions of competition apply to all undertakings operating in the internal market ("level playing field")'.[28] The 'substantive law of unfair competition' should be implemented along uniform criteria in order for 'uniform conditions in respect of EU substantive competition law [to] apply to all undertakings operating in the internal market'.[29] Thus,

> as a central element of the competition rules necessary for the functioning of the internal market, the notion of undertaking must be given a uniform interpretation and application throughout the European Union and cannot depend on the particularities of the Member States' national company law. Otherwise it would not be possible to ensure a uniform legal framework ('level playing field') for undertakings active on the internal market.[30]

Article 101 TFEU is therefore presented as supporting 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as

24. Commission Interim Report from the Commission to the Stockholm European Council – Improving and simplifying the regulatory environment COM (2001) 0130 final, Sheet I.
25. Case C-73/11 P *Frucona Košice a. s. v European Commission* [2012], Opinion of AG Kokott, para 55.
26. Case C-557/12 *Kone AG & Ors* [2014], Opinion of AG Kokott, para 29.
27. Case C 431/07 P *Bouygues SA and Bouygues Télécom SA v Commission of the European Communities* [2008], Opinion of AG Trstenjak, para 125.
28. Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* [2011], Opinion of AG Kokott, para 67.
29. Case C-681/11 Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schenker & Co. AG & Ors [2013], Opinion of AG Kokott, para 48.
30. Case C-501/11 P *Schindler Holding Ltd & Ors v European Commission*, [2019], Opinion of AG Kokott, para 76.

possible ("*level playing field*") on the internal market for all undertakings active in it'.[31] Similarly, the requirements of Article 102 TFEU 'must be administered uniformly throughout the European Union so as to ensure that all undertakings active on the internal market operate within framework conditions for the rules of competition which are as uniform as possible ("level playing field")'.[32] The assertion is also true for the *de minimis* rules in antitrust practices in that they '[support] the creation of equal competition conditions ('level playing field') (35) in the internal market and also [enhance] legal certainty for the undertakings concerned'.[33]

On the institutional level, Advocate General Kokott explains that the choice of establishing the 'Commission [as] the supranational competition authority was to subject all undertakings in the European Union to uniform rules in the field of competition law and to create equal conditions of competition (a "level playing field") for them in the internal market'.[34]

On the jurisdictional level, the opinion of the advocate general insists on the necessity for national courts to apply Article 101 TFEU uniformly when they assess the civil liability of the parties to an agreement under review. Indeed, if the conditions of the implementation of that responsibility were different among Member States, that would challenge 'the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible ('*level playing field*') on the internal market for all undertakings active in it'.[35]

Lastly, on the procedural level, the principle *non bis in idem* 'in the field of competition law (…) helps to improve and facilitate the business activities of undertakings in the internal market and, ultimately, to create uniform conditions of competition (a "level playing field") throughout the EEA'.[36]

The level playing field thus seems to be a favourite argument of Advocate General Kokott to establish the foundations of competition law in the internal market. It allows to justify a double characteristic of that law. First, the latter purports to ensure equality among the economic operators. Then, this implies a uniform application of competition rules in the internal market.

In any way, one should not be mistaken as to the level playing field. As the Commission asserted in its directives on the application of Article 81(3) of the Treaty,[37] 'Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded'.[38] Indeed, while 'The purpose of Article [101 TFEU] is to protect effective competition by ensuring that markets remain open and competitive [, t]he protection of fair conditions of competition is a task for the legislator in compliance with EEA law obligations and not for undertakings to regulate themselves'.[39] One may conclude that the level playing field cannot be an argument

31. Case C-435/18 *Otis GmbH & Ors v Land Oberösterreich & Ors* [2019], Opinion of AG Kokott, para 55.
32. Case C-23/14 *Post Danmark A/S v Konkurrencerådet* [2015], Opinion of AG Kokott, para 77.
33. Case C-226/11 *Expedia Inc. v Autorité de la concurrence & Ors* [2012], Opinion of AG Kokott, para 37.
34. Case C-550/07 P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission [2010], Opinion of AG Kokott, para 169.
35. Case C-435/18 *Otis GmbH & Ors v Land Oberösterreich & Ors* [2019], Opinion of AG Kokott, para 55.
36. Case C-17/10 Toshiba Corporation and others v Úřad pro ochranu hospodářské soutěže [2011], Opinion of AG Kokott, para 118.
37. Commission Communication, Notice Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ, 97, para 47. Guidelines on the application of Article 53(3) of the EEA Agreement [2007] OJ C 208, 1, para 47.
38. ibid.
39. ibid.

that would in itself allow to exempt an agreement under Article 101(3) TFEU. In other words, it is not for companies to adopt anti-trust behaviour to restore fair competition conditions. That mission is the mission of competition authorities or courts via the application of anti-trust practice law.

However, in the decision-making practice of the Commission, the level playing field is seldom mentioned in the decisions adopted under Articles 101 and 102 TFEU.[40] What it reveals is rather that the relaxing of competition rules may be a means of supporting European companies against third-country companies which are subject to lower requirements from their State of origin. In the control of concentrations, there is a paragraph in a decision in which the European Commission considers that the commitments of railway operators as to the pricing of services in the stations and in the maintenance centres allow to 'create a level playing field'.[41]

The correlation with State aid law. The argument of the level playing field is used in very few decisions of the Commission on State aid.

First, all State-aid law is founded on the idea of the level playing field, even though it remains almost completely implicit. Indeed, only Advocate General Wathelet has stated that 'the State's intervention [is] simply to ensure a level playing field (in other words, to ensure that undertakings can compete on equal terms)'.[42] This assertion sums up the substantial link that exists between State aid and fair competition conditions. Far from letting the market have its way, the level playing field implies that the State intervenes, which constitutes an advantage as per Article 107(1) TFEU, the compatibility of which will depend on its capacity to restore equality among economic operators, unless the difference in treatment is justified on the ground of a general interest.

Then the level playing field has been taken into consideration in the assessment of the compatibility of State aid with the market. It is especially the case in a series of decisions on the financing of civil servants' pensions. Thus, the Commission stated that the assessment of how compatible State aid to the French company La Poste about the pension scheme is must be 'carried out with regard to the establishment of a level playing field for social security contributions and tax payments between La Poste and its competitors in the mail/parcels and financial services sectors, which make up the bulk of La Poste's activities'.[43] In a decision on the financing of the pensions of civil servants working for France Télécom, the Commission indicated that in its previous decision, 'it created a genuine playing field between La Poste and its competitors' before adding that 'that reform, precisely by creating such a level playing field, was an important step in the adaptation of La Poste to the progressive liberalisation of the postal market, which is an important Community objective and plays a significant role within the framework of the Lisbon strategy for growth and employment'.[44] The Commission however concluded that, here, 'the rate of contribution in

40. See however Case C-286/13 P *Dole Food Company Inc. et Dole Fresh Fruit Europe v European Commission* [2014], Opinion of AG Kokott, paras 119 and 120.
41. Commission Decision of 13 May 2015 declaring a concentration compatible with the common market (Case N COMP/M.7449 – *Sncf Mobilities v Eurostar international limited*) based on Regulation (EC) N 139/2004 of the Council).
42. Case C-677/11 *Doux Élevage SNC* [2013], Opinion of AG Wathelet, para 65.
43. Commission Decision of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (notified under document number C(2007) 4545), [2008] OJ, para 158.
44. State Aid – France State aid C 25/08 (ex NN 23/08) – Reform of the method of financing the pensions of public-service employees working for France Télécom Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2008], OJ, 11.

full discharge of liabilities applying to France Télécom since 1996 cannot ensure a level play field between that company and its competitors'.[45] Similarly, the compatibility of the aid that the financing of the RATP pension scheme constituted was 'assessed in relation to the creation of a level playing field in terms of mandatory social contributions between RATP and its current, potential and future competitors'.[46] This shows again that the level playing field aims to ensure equality among operators and, more precisely, among public operators, pursuant to Article 106(1) TFEU, and private operators.

Other decisions also refer to the level playing field without it being possible to draw general conclusions from it. For example, a decision on Irish fishing aid indicates that 'the Commission is promoting the respect of a level playing field between Member States that apply a Tonnage Tax'.[47] On an *ad hoc* basis, the level playing field has for instance been taken into consideration by the Commission when a State has modified its aid project that was initially amended.[48] Advocate General Kokott also refers to that objective to justify that the margin of appreciation left to national authorities which grant State aid should be limited, for 'There would be a serious risk that the effectiveness of the State aid control exercised by the Commission would be undermined and that the uniform interpretation and application of the European competition rules would be adversely affected. The fundamental aim of uniform conditions of competition for all undertakings operating in the internal market ("level playing field") would thus be significantly jeopardised.'[49] The argument of the level playing field may operate to temper an objective of general interest. For example, even though such an objective, like the environment objective which aims to prevent carbon dioxide emissions, has been acknowledged, the effects of competition distortion of aid measures must absolutely be limited to maintain fair competition conditions for all the actors of the internal market.[50]

The expression is used to promote the uniform application of State aid rules. Thus, the discretionary power of national courts to consider that the guarantee is null and void because it violates Article 108 (3)(3) TFEU is excluded, since that would be

> Different rights and obligations for undertakings operating in the internal market according to the Member State and competent national court concerned must not follow from EU competition law. European competition law must rather be interpreted and applied in such a way that, as a result of a uniform legal framework, equivalent conditions of competition apply to all undertakings operating in the internal market ('level playing field').[51]

Moreover, the argument of the level playing field does not allow a Member State to thwart a decision of the Commission. The latter has indeed considered that 'The existence

45. ibid.
46. Commission Decision of 13 July 2009 concerning the reform of the method by which the RATP pension scheme is financed (State aid C 42/07 (ex N 428/06)) which France is planning to implement in respect of RATP (notified under document C(2009) 5505) [2009], OJ, para 122.
47. State Aid – Ireland State aid C 2/08 (ex N 572/07) – Modification of tonnage tax Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2008], OJ C 117, para 12.
48. Commission Decision (EU) 2015/120 of 29 October 2014 on the aid scheme SA.27317 (C 25/09) (ex N 673/08) which Italy is planning to implement for digital projection equipment (notified under document C(2014) 7888) [2015], OJ L 25, paras 21 et 69.
49. Case C-73/11 P *Frucona Košice a.s. v Commission* [2012], Opinion of AG Kokott, para 55.
50. Commission Decision (EU) 2016/695 of 17 July 2013 on the aid scheme SA.30068 C 33/2010 (ex N 700/2009) – Aid to non-ferrous metal producers for CO_2 costs of electricity (notified under document C(2013) 4420), [2016], OJ L 120, para 112.
51. Case C-275/10 *Residex Capital IV CV v Gemeente Rotterdam* [2011], Opinion of AG Kokott para 67.

of similar exemptions for public undertakings in other Member States or the absence of a level playing field at European level does not justify a failure to implement the Commission decision proposing appropriate measures'.[52]

Last, according to the decisions of the Commission and a 2000 case, the recovery of illegal and incompatible aid has been deemed necessary to 'restore the "fair conditions of competition" which existed before the aid was granted'.[53] However, the expression disappeared afterwards, without the principle and logic of the recovery of State aid being questioned.

Crisis law. It is interesting to note that the authorities of the European Competition Network referred to the level playing field in public releases about the Covid-19 crisis and war in Ukraine. They stated that

> the different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions.[54]

This confirms the reading according to which the level playing field is the motivation of public action designed to correct market malfunctions as may happen in times of crisis. Supervision of State aid is presented as allowing to ensure that fair competition conditions are maintained, which implies avoiding 'harmful subsidy races, where Member States with deeper pockets can outspend neighbours to the detriment of cohesion within the Union'.[55]

B. Intermittent instrumentalisation in positive integration

There are very few instances of the level playing field in legal acts adopted by Union institutions on the actions and policies related to the third part of the TFEU. It is not easy to draw general conclusions from those instances. It may even be fallacious to consider they produce legal effects. The level playing field seems to be more a supplementary argument supporting

52. Decision (EU) 2016/634 of 21 January 2016 on aid measure SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004) implemented by the Netherlands – Corporate tax exemption for public undertakings, para 81.
53. Case T-288/97 *Regione Friuli Venezia Giulia v Commission* [2001], para 110; Case T-55/99 *Confederación Española de Transporte de Mercancías (CETM)* [2000], para 173; Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta Mauro and others v Commission* [2000], para 176; Case T-288/97 *Regione autonoma Friuli Venezia Giulia v Commission* [1999], para 110; Case C-372/97 *Italian Republic v Commission* [2004], para 102; Commission Decision of 22 October 1996 on a tax credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95) [1997], OJ L 106, 22; Commission Decision of 30 July 1997 concerning aid granted by the Friuli-Venezia Giulia Region (Italy) to road haulage companies in the Region [1998] OJ L 66, 18; Commission Decision of 1 July 1998 concerning the Spanish Plan Renove Industrial system of aid for the purchase of commercial vehicles (August 1994-December 1996), [1998] OJ L 329, 2.
54. European Competition Network, Message to companies about the Covid-19 crisis published on 23 March 2020. Antitrust: Joint statement by the European Competition Network (ECN) on the application of competition law in the context of the war in Ukraine, 24 February 2022: 'As stated in our joint statement on the application of competition law during the Covid crisis, the different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions'.
55. Commission Communication from the Commission Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak [2020], OJ C 91I, 1, para 10.

the justification of an action which could, in any case, be founded on other elements. Thus, searching for the level playing field argument will be better assessed using an archaeological method. This refers to the hypotheses it is possible to establish based on regularities found in a discourse. It appears indeed that the references to the level playing field correspond more to a justificatory approach than to a foundational one. The Union institutions essentially refer to it in order to add another argument to justify a measure of the Union.

General invocation – in the course of a recital. In many texts, fair competition conditions are invoked in a very general manner to support action, without this being decisive. At best it means that the legislator of the Union or the Commission adds a justificatory element for the adoption of a measure. The domain of financial services is representative of such an approach which mainly consists in mentioning fair competition conditions in the course of a recital. That is especially the case in banking directives, and has been so since the 2000s.[56] The level playing field then accompanied the institutional evolutions of financial regulation. Thus, it was invoked to set up the European Committees of Banking Supervisors, of Securities Regulators and of European Insurance and Occupational Pensions which were replaced in 2010 respectively by the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority.[57] Later on, the Capital Requirements Regulation (CRR) on prudential requirements for credit institutions stated that those requirements 'are necessary to ensure similar safeguards for savers and fair conditions of competition between comparable groups of institutions'.[58] More generally, in the regulation establishing the single dispute mechanism, the legislator underlined that Ensuring effective and uniform resolution rules and equal conditions of resolution financing across Member States is in the best interests not only of the Member States in which banks operate but also of all Member States in general as a means of ensuring a level competitive playing field and improving the functioning of the internal market.[59]

56. Commission First Commission report to the European Parliament and the Council on the implementation of the own funds Directive (89/299/EEC): 'The Own Funds Directive is part of a wider effort to harmonise minimum prudential standards for financial institutions in the EU with the dual aim of safeguarding the safety and soundness of the financial system and to establish a level playing field for financial institutions competing in the single market'. See also European Parliament and Council Directive 2000/46/EC of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions [2000], OJ L 275, 39, Rec. 12; European Parliament and Council Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, [2000], OJ, 1, Rec. 8.
57. The expression 'level playing field' is translated as '*conditions réellement égales*' ('really equal conditions'). European Parliament and Council, Recitals 2 of Regulation (EU) N° 1093/2010 of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/78/EC [2010], OJ L 331, 12; Regulation (EU) N° 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/79/EC [2010], OJ L 331, 48; Regulation (EU) N° 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision N° 716/2009/EC and repealing Commission Decision 2009/77/EC [2010], OJ L 331, 84.
58. European Parliament and Council Regulation (EU) N° 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N° 648/2012 [2013] OJ L 176, 1, Rec. 33.
59. European Parliament and Council Regulation (EU) N° 806/2014 of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) N° 1093/2010 [2014], OJ L 225, 1, Rec. 12. See also Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency [2014], OJ L74, 65, para 7.

The Commission had expressly set as a strategic objective the '[Strengthening of] the internal market for banking services while maintaining a level playing field'.[60] Conversely, the level playing field is completely left aside in the draft regulation aiming to establish the single supervision mechanism, which shows there is no legal rationality in the legislator's references to that notion. Last, still about financial matters, the level playing field argument is found in a few regulations supporting a very specific system.[61] The occasional presence of the argument in the motivation of the act can be found in other fields of action of the Union, such as agriculture (at least in wine matters),[62] fishing,[63] transport,[64] the environment[65] or the digital technology.[66]

Another type of occurrence is revealing of the temporality of the argument of the level playing field. It is sometimes retrospectively that fair competition regulations have justificatory virtues. For example, the Union legislator has estimated that the Communication of the Commission of 10 January 2007 entitled 'An Energy Policy for Europe' 'highlighted the importance of completing the internal market in electricity and of creating a level playing

60. European Parliament and Council Proposal for a Regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) N° 1093/2010 of the European Parliament and of the Council, COM/2013/0520, Legislative financial statement, para 1.4.1.
61. Commission Delegated Regulation (EU) 2017/208 of 31 October 2016 supplementing Regulation (EU) N° 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for additional liquidity outflows corresponding to collateral needs resulting from the impact of an adverse market scenario on an institution's derivatives transactions [2017], OJ L 33, 14, Rec. 3 (on the calculation of the additional collateral outflows for institutions and derivative markets); Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing European Parliament and Council Directive 2014/59/EU with regard to ex ante contributions to resolution financing arrangements [2015], OJ L 11, 44, Rec. 8 (on the calculation of contributions in banking groups).
62. European Parliament and Council Regulation (EU) N° 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) N° 922/72, (EEC) N° 234/79, (EC) N° 1037/2001 and (EC) N° 1234/2007 [2013], OJ L 347, 671; Commission Regulation (EC) N° 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) N° 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products [2009], OJ L 193, 60; Council Regulation (EC) N° 1493/1999 of 17 May 1999 on the common organisation of the market in wine, [1999], OJ L 179, 1.
63. European Parliament and Council Regulation (EU) 2018/973 of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) N° 676/2007 and (EC) N° 1342/2008 [2018], OJ L 179, 1; European Parliament and Council Regulation (EU) N° 1380/2013 of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) N° 1954/2003 and (EC) N° 1224/2009 and repealing Council Regulations (EC) N° 2371/2002 and (EC) N° 639/2004 and Council Decision 2004/585/EC [2013], OJ L 354, 22.
64. European Parliament and Council Regulation (EC) N° 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) N°s 1191/69 and 1107/70 [2007], OJ L 315, 1, Rec. 8; European Parliament and Council Directive 2006/22/EC of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) N° 3820/85 and (EEC) N° 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC [2006], OJ L 102, 35, Rec. 5.
65. European Parliament and Council Directive 2009/29/EC of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009], OJ L 140, 63, Rec. 28.
66. European Parliament and Council Regulation (EU) 2018/1971 of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) N° 1211/2009 Text with EEA relevance [2018], OJ L 321, 1, Rec. 9.
European Parliament and Council Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018], OJ L 321, 36, Rec. 3.

field for all electricity undertakings established in the Community.'[67] Similarly, even though there has been no mention of the level playing field in the directives that have been adopted since the 1980s, it has been asserted that the public procurement rules allow to guarantee competition conditions to all the economic operators.[68]

Those few instances, which remain very rare compared to the normative inflation of secondary law in the legal acts of the Union, do not provide a lot of information. The internal market and common policies, the most important like the most technical legislative acts, are all affected. It is therefore reasonable to think that the mention of the level playing field is due to chance or at least to legislative contingencies. It is part of the mystery shrouding the making of secondary legislation, from the draft act elaborated by the Commission until its adoption by the European Parliament and the Council. Then, from a legal point of view, the level playing field is nothing more than a decisive argument on which the normative action of the Union can be based.

The level playing field discourse is nonetheless quite informative as it provides information as to the type of action of the Union that is being considered.

Normative action. In its general guidelines about the application of Article 81(3) of the Treaty, the Commission underlines that while '[t]he purpose of Article [101 TFEU] is to protect effective competition by ensuring that markets remain open and competitive [, t]he protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations (66) and not for undertakings to regulate themselves'.[69] This supports the idea that the level playing field is an argument which purports to justify a normative action of the European Union compensating for the shortcomings of the market. The Union legislator thus stated that '[to improve] the functioning of the market (…) notably concrete provisions are needed to ensure a level playing field'.[70] In other words, if it is the legislator which has to adopt measures to defend fair competition conditions, it is because it is a political choice.

However, in the areas of shared competence the legislative action must conform to the subsidiarity principle. Quite surprisingly, the argument of the level playing field is seldom used even though it could allow to assert that the objectives of the act 'cannot be sufficiently achieved by the Member States but can rather, due to the need to overcome market fragmentation and ensure a level-playing field in the Union, be better achieved at Union level'.[71]

The level playing field can also guide which type of legal act should be chosen. Unsurprisingly, it is generally regulations which contain a reference to the fair competition conditions, and directives of complete harmonisation may be concerned, though more rarely.

67. European Parliament and Council Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009], OJ L 211, 55, Rec. 7. Commission Communication to the European Council and the European Parliament – An energy policy for Europe, COM/2007/0001.
68. Case T 384/10 *Kingdom of Spain v Commission* [2013], para 116. Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives [2006], OJ C 179, 2.
69. Commission Communication – Notice – Guidelines on the application of Article 81(3) of the Treaty [2004], OJ C 101, 97, para 47. The Guidelines on the application of Article 53(3) of the EEA Agreement [2007], OJ C 208, 1, para 47.
70. European Parliament and Council Directive 2003/55/EC of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003], OJ L 176, 57, Rec. 2.
71. European Parliament and Council Directive 2014/92/EU of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014], OJ L 257, 214, Rec. 65.

Quite explicitly, the legislator has decided to invoke those conditions to justify resorting to the regulation in that the latter 'is the best possible guarantee for a level playing field, uniform conditions of competition and the common appropriate standard of investor protection'.[72] Establishing fair competition conditions at a global level for sea transport has justified delegating to the Commission the power to adopt acts in accordance with Article 290 TFEU.[73] For example, in order to set the *ex ante* contributions by banking institutions to the Single Resolution Fund, the Council has adopted an implementing regulation and decided that 'the same methodology for the calculation of annual contributions in all Member States should preserve a level playing field among participating Member States and a strong internal market'.[74]

Fair competition conditions thus call for uniformity in the application of Union law. They are also mentioned to justify the uniform interpretation of Union law provisions. That is, for example, the case of the directives aiming to 'prevent competition distortions and therefore ensure there is a level playing field in the economic sectors subject to excise duties'.[75] Generally, 'a systematic judicial review of compliance with that obligation contributes to ensuring a level playing field for creditors'.[76]

A flexible notion, the level playing field has also been invoked to support, in business law, arguments in favour of harmonisation, as in the Payment Services Directive,[77] the Directive on Reassurance,[78] the Directive on take-over bids,[79] or the Consumer Credit Directive.[80] It is obvious that it is necessary that national legislations be brought closer when their differences may be detrimental to fair or homogeneous competition conditions.

Equality among actors in the market. The argument of the level playing field is essentially designed to support normative action aiming to re-establish equality among market players.

In a first set of assumptions, relations among private actors are involved. For example, in transport, the will to promote the establishment of fair competition conditions among modes

72. Commission Delegated Regulation (EU) 2016/438 of 17 December 2015 supplementing Directive 2009/65/EC of the European Parliament and of the Council with regard to obligations of depositaries [2016], OJ L 78, 11, Rec. 1. Commission Delegated Regulation (EU) N° 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision [2013], OJ L 83, 1, Rec. 1.
73. European Parliament and Council Directive 2013/38/EU of 12 August 2013 amending Directive 2009/16/EC on port State control [2013], OJ L 218, 1, Rec. 21.
74. Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) N° 806/2014 of the European Parliament and of the Council with regard to ex ante contributions to the Single Resolution Fund [2015], OJ L 15, 1, Rec. 10.
75. Case C-240/01 *Commission / Germany* [2003] Opinion of AG Geelhoed, para 53.
76. Cases C-679/18 and C-616/18 *Cofidis SA* [2019] Opinion of AG Kokott, para 52.
77. Commission Communication to the Council and the European Parliament on the Prevention of and the Fight against Terrorist Financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions, COM/2004/0700, para 1.7. Draft Directive on a New Legal Framework for Payments in the Internal Market. The Commission is working on the above draft proposal which will ensure the harmonised implementation of Special Recommendation VI of the Financial Action Task Force into Community law and thereby guarantee a level playing field for all providers.
78. European Parliament and Council Proposal for a Directive on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC and Directives 98/78/EC and 2002/83/EC {SEC(2004)443}: 'Reinsurance is an insurance activity and therefore direct insurance rules should apply, and not specific reinsurance regulations. Different rules between insurance and reinsurance could make it increasingly difficult to create a level playing-field'.
79. European Parliament and Council Proposal for a Directive on takeover bids [2003], OJ C 45E, 1.
80. European Parliament and Council Proposal for a Directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers [2002], OJ C 331E, 200.

of transport[81] or companies belonging to a same sector[82] has been asserted. In other areas, the legislator has also mentioned the creation or setting up of fair competition conditions among insurance intermediaries,[83] 'financial institutions competing in the single market'[84] or in the domain of recycling.[85] The normative intervention thus purports to restore equality among market players in order to ensure 'fair competition'.[86] However, the argument of fair competition conditions appears flexible, as it is invoked for equality among market actors,[87] or even among all the consumers,[88] as well as operators in 'comparable groups',[89] among products,[90]

81. Protocol on the implementation of the 1991 Alpine Convention in the field of transport – Transport protocol [2007] OJ L 323, 15, Art. 1(e). Commission Communication to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Air transport and the environment Towards meeting the challenges of sustainable development COM/99/0640, para 31.
82. Commission Implementing Regulation (EU) 2015/171 of 4 February 2015 on certain aspects of the procedure of licensing railway undertakings [2015], OJ L 29, 3, Rec. 10. Council Decision of 7 June 2007 authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation [2007], OJ L 161, 63, Rec. 4.
83. European Parliament and Council Directive (EU) 2016/97 of 20 January 2016 on insurance distribution (recast) [2016], OJ L 26, 19, Rec. 16.
84. Commission First Commission report to the European Parliament and the Council on the implementation of the own funds Directive (89/299/EEC), COM/2000/0074.
85. European Parliament and Council Regulation (EC) N° 1013/2006 of 14 June 2006 on shipments of waste [2006], OJ L 190, 1, Rec. 22.
86. European Parliament and Council Directive 2000/46/EC of 18 September 2000 on the taking up, pursuit of and prudential supervision of the business of electronic money institutions [2000], OJ L 275, 39, Rec. 12. On the level playing field between electronic money institutions and other credit institutions issuing electronic money.
'(12) However, it is necessary to preserve a level playing field between electronic money institutions and other credit institutions issuing electronic money and, thus, to ensure fair competition among a wider range of institutions to the benefit of bearers'.
87. European Parliament and Council Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018], OJ L 321, 36, Rec. 3. Commission Delegated Regulation (EU) N° 2015/2446 of 28 July 2015 supplementing Regulation (EU) N° 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code [2015], OJ L 343, 1, Rec. 27.
European Parliament and Council Regulation (EU) 2018/973 of 4 July 2018 establishing a multiannual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks, specifying details of the implementation of the landing obligation in the North Sea and repealing Council Regulations (EC) N° 676/2007 and (EC) N° 1342/2008 [2018], OJ L 179, 1, Rec. 13.
88. Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency [2014], OJ L 74, 65, Rec. 7.
89. European Parliament and Council Directive 2000/12/EC of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions [2000], OJ L 126, 1, Rec. 8. European Parliament and Council Regulation (EU) N° 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) N° 648/2012 [2013], OJ L 176, 1, Rec. 33.
Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements [2015], OJ L 11, 44, Rec. 9.
90. European Parliament and Council Regulation (EU) N° 1380/2013 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) N° 1954/2003 and (EC) N° 1224/2009 and repealing Council Regulations (EC) N° 2371/2002 and (EC) N° 639/2004 and Council Decision 2004/585/EC [2013], OJ L 354, Article 2(5)(g).

within one business sector,[91] or even on a same market.[92] The opening to competition of some markets may also explain the use of the notion of fair competition conditions. That was the case for telecommunications: an advocate general interpreted the provisions of a directive of liberalisation of the licences of operators in light of those conditions. In that respect, the tender for licence candidacies was not capable of guaranteeing fair competition conditions among operators.[93] Indeed, 'the starting point for ensuring fair conditions of competition between operators on an emerging market is first to guarantee equal conditions for all operators'.[94]

In a second set of assumptions, the aim is to ensure equality among public and private operators.[95] For example, fair competition conditions are invoked in the Regulation on 'Public Service Obligations' (PSO) to strictly regulate the capacity of a local or national authority to provide public transport services for passengers on its territory or to entrust them to an internal operator without fair competitive procedures.[96] That is especially true in markets open to competition which are characterised by the presence of dominant historical operators. Thus, an advocate general underlined that 'The aim of EU energy policy is the opening up of markets, increase [*sic*] competition and the create [*sic*] a level playing field by no longer giving preferential treatment to former monopolies. (28) The principle of equal access is crucial in achieving this aim.'[97] The legislator may also, in order to ensure fair competition conditions, exclude from the field of application some public companies because they provide a type of limited services.[98] More generally, the Council has underlined that 'in the public sector, structural reform has to be carried further so as to improve the efficiency of the public sector and to ensure transparent and fair competition between private and public enterprises'.[99] Within the context of the enlargement, the Commission called for ensuring both that the public radio broadcast service plays its role as a public service for all the communities and creates fair competition conditions among private and public media.[100]

The instruments to guarantee such equality still remain to be determined. Secondary law does not say a lot in that respect. In short, the argument of the level playing field occa-

91. European Parliament and Council Regulation (EU) Nº 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012], OJ L 201, 1, Rec. 42.
92. European Parliament and Council Directive 2001/107/EC of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses [2002], OJ L 41, 20, Rec. 13. On market for harmonised collective investment undertakings.
93. Case C-431/07 P *Bouygues SA and Bouygues Télécom SA v Commission* [2008], Opinion of AG Trstenjak, Rec. p. I-2665, para 125.
94. ibid, para 126.
95. OCDE, Competitive Neutrality: maintaining a level playing field between public and private business, 2012, <https://www.oecd.org/corporate/50302961.pdf>.
96. European Parliament and Council Regulation (EC) Nº 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nºs 1191/69 and 1107/70 [2007], OJ L 315, 1, Rec. 8.
97. Case C-264/09 *European Commission v Slovak Republic* [2011], Opinion of AG Jääskinen, para 50.
98. European Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014], OJ L 173, 349, Rec. 29. On undertakings held jointly by local State-owned firms, in the energy sector.
99. Council Decision of 29 July 1991 adopting the annual economic report 1990/91 on the economic situation in the Community and the economic policy orientation for the Community in 1991 [1991], OJ L 252, 17.
100. Council Decision of 30 January 2006 on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC [2006], OJ L 35, 32.

sionally serves to justify either obligations or actions. For example, 'In order to ensure a level playing field, novel tobacco products, that are tobacco products as defined in this Directive [on tobacco products], should comply with the requirements of this Directive'.[101] Similarly, the obligation for any credit institution to join a deposit guarantee scheme was justified by the necessity to ensure a 'level playing field between credit institutions'.[102] Another example is the fact that the Commission has set eco-design requirements applicable to decentralised solid fuel heating systems to 'create a level playing field in the market'.[103]

In other texts, procedural rules are established to ensure fair competition conditions among economic operators.[104] A few texts link the creation of fair competition conditions to the action of regulatory authorities. For example, the Court has underlined that the directive on the internal market in natural gas 'purported to give a central role to national regulatory authorities that contribute to the development of an internal gas market and the creation of fair competition conditions by transparently cooperating among them and with the Commission'.[105]

Moreover, fair competition conditions are invoked to justify implementing supervision of market players.[106] Thus Article 65 of the directive on the internal market in electricity lists the measures that the Member States may adopt to guarantee fair competition conditions.[107] Essentially, those measures are constraints which may nonetheless be justified on grounds of general interest and the implementation of which is subject to notification to the Commission for the latter to approve.

It would however be useless to believe that the sole mentioning of the level playing field can be enough to intervene to restore equality. This question is eminently domain-dependent. Fiscal matters are revealing of the indecisive nature of the argument of fair competition conditions. Admittedly, the latter are presented as being at the heart of the general debate on the harmful tax policy,[108] especially the reduction of tax distortion and fight against aggressive tax,[109] and of the harmonisation of indirect taxes.[110] Concretely speaking though, nothing is being considered because, as an advocate general underlines, in inter-

101. European Parliament and Council Directive 2014/40/EU of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014], OJ L 127, 1, Rec. 35.
102. European Parliament and Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes (recast) [2014], OJ L 173, 149, Rec. 13.
103. Commission Regulation (EU) 2015/1185 of 24 April 2015 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for solid fuel local space heaters, [2015] OJ L 193, 1, Rec. 13.
104. Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) Nº 952/2013 of the European Parliament and of the Council laying down the Union Customs Code [2015], OJ L 343, 558, Rec. 27.
105. Case T-317/09 *Concord Power Nordal GmbH* [2010], para 45.
106. European Parliament and Council Regulation (EU) Nº 910/2014 of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014], OJ L 257, 73, Rec. 36.
107. European Parliament and Council Directive (EU) 2019/944 of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019], OJ L 158, 125, Rec. 21.
108. Joined Cases C106/09 P and C107/09 P, *European Commission* (C-106/09 P), *Kingdom of Spain* (C-107/09 P) *v Government of Gibraltar and United Kingdom*, [2011], Opinion of AG Jääskinen, para 129.
109. Council Recommendation of 14 May 2018 on the economic policy of the euro area [2018], OJ C 179, Rec. 2.
110. Case C-240/01, Commission of the European Communities v Federal Republic of Germany [2003], Opinion of AG Geelhoed, para 53.

national tax matters, the identification of a level playing field lacks clarity and calls for a much more complex analysis.[111]

More rarely, how fair competition conditions may be guaranteed is specified. First, the aim is to guarantee access to the network of operators which is tightly linked to the level playing field.[112] For example, the regulations establishing network codes setting the requirements for the connection to the infrastructure grid are justified by the objective of guaranteeing fair competition conditions. Thus, the electricity grid managers are imposed obligations to ensure that 'system operators make appropriate use of the power-generating facilities' capabilities in a transparent and non-discriminatory manner to provide a level playing field throughout the Union'.[113] It is the same for the requirements for connection to high-voltage direct current systems,[114] facilities for consumption connected to a transportation network, facilities of a distribution network connected to a transportation system or distribution networks, including closed distribution networks.[115] It is more an argument allowing to define the spirit of the enacted measures. In a first approach, the level playing field is invoked in advance to justify the adoption of legal acts allowing access to the market for some players using specific technologies.[116] In the broadband sector, the Commission has for example recommended the use of a 'concept' (Equivalence of Input, EoI) which 'is in principle the surest way to achieve effective protection from discrimination as access seekers will be able to compete with the downstream business of the vertically integrated SMP [Significant Market Power] operator using exactly the same set of regulated wholesale products, at the same prices and using the same transactional processes' because that concept allows to 'deliver transparency and address the problem of information asymmetries' [recital 13] in order to '[ensure] a level playing field between the SMP operator's downstream businesses, for example, its retail arm, and third-party access seekers, and [promote] competition [para 7]'.[117]

From that study of Union law, a conclusion may be drawn: the level playing field is an argument of the discourse that Union institutions use in order to justify an action, which is essentially normative, designed to correct market malfunctions when actors are not in a situation of equality. Lato sensu, all the internal market law is therefore permeated with a logic of level playing field when equality among market players must be ensured. Stricto sensu, only the acts of secondary law aiming to restore that equality are justified by fair competition conditions. However, the latter are not an element of justification which would in itself allow to found an action of the Union. They rather play in a way that is as supplementary as it is occasional, in very limited cases, to provide a reason for measures that are

111. Case C-240/01 *Commission v Germany* [2003], Opinion of AG Geelhoed, para 129.
112. Case C 556/12 *TDC, A/S v Teleklagenævnet* [2014], Opinion of AG Cruz Villalón, para 32.
113. Commission Regulation (EU) 2016/631 of 14 April 2016 establishing a network code on requirements for grid connection of generators [2016], OJ L 112, Article 1.
114. Commission Regulation (EU) 2016/1447 of 26 August 2016 establishing a network code on requirements for grid connection of high voltage direct current systems and direct current-connected power park modules [2016], OJ L 241, Article 1.
115. Commission Regulation (EU) 2016/1388 of 17 August 2016 establishing a Network Code on Demand Connection [2016], OJ L 223, 10, Article 1.
116. Commission Regulation (EU) 2015/1185 of 24 April 2015 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for solid fuel local space heaters [2015], OJ L 193, 1.
117. Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment [2013] OJ L 251, Rec. 13 and para 7.

adopted in Union law and found the latter's corrective public action in a market economy. The level playing field justifies another form of action in the relations of the European Union with the rest of the world.

II. The protective regulation of the internal market

The level playing field is at the heart of an external action of the Union, or, to be more precise, a new form of external action. The Union's vision of free trade is no longer naive. The principle according to which the opening of the internal market allows access of European companies to the markets of third countries by reason only of reciprocity is outmoded. Admittedly, the common trade policy still has its virtues in the context of the crisis of multilateralism, which explains why the Union favours the conclusion of bi- or multilateral free-trade agreements. It now reflects a renewed vision of free trade that is guided by the will to guarantee the European Union's 'open strategic autonomy'[118] in which to the economic approach expressing faith in the global market is added a geopolitical reading that reveals realism in international relations. The trade policy, and with it all the Union's external relations, has three objectives: 'supporting the recovery and fundamental transformation of the EU economy in line with its green and digital objectives'; 'shaping global rules for a more sustainable and fairer globalisation'; 'increasing the EU's capacity to pursue its interests and enforce its rights, including autonomously where needed'.[119] In order to reinforce the role of the Union as a global actor, the Union institutions work for fair competition conditions by ensuring 'our capacity to react to unfair practices and a lack of reciprocity'[120] and promoting 'international trade rules that are properly enforced and provide for a level playing field'.[121] Within that logic, the level playing field is the discourse that justifies at the same time an extended territoriality of Union law (A) and equality restored by Union law (B).

A. The extended territoriality of the geopolitical legislation of the Union

The 2020s have been marked by the renewal of the theme of extraterritoriality, one of the most prominent signs of which is the 'Brussels effect'. On the scientific level, research has

118. Commission 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Empty *Trade Policy Review – An Open, Sustainable And Assertive Trade Policy*' [2021], COM(2021) 66.
119. ibid, 10-11.
120. European Parliament Council of the European Union and European Commission, Joint Conclusions on Policy Objectives and Priorities for 2020-2024 [2021], OJ C 18I, 5, para 7; European Parliament, Council of the European Union and European Commission, Joint Conclusions on Policy Objectives and Priorities for 2020-2024, [2020], OJ C 451I, para 7.
121. ibid, para 4.

shown the hackneyed character of the expression 'extraterritoriality'.[122] That of territoriality should be preferred, as it is legally more accurate and politically more realistic. In Union law, territoriality shows a geopolitical turn. A clarification on the legal basis of legislative action is needed first. Answering to the argument of the EU Council according to which a convention used the 'establishment of the internal market because, by reducing disparities between the national legal orders, it helps to create uniform legal conditions ("level playing field")',[123] Advocate General Kokott stated that

> Under Article 114 TFEU, harmonisation measures with the aim of reducing legal disparities between the Member States may be taken if those disparities are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market. (31) However, the purpose must always be to reduce legal disparities *between the Member States* of the European Union, and not to reduce legal disparities between the Member States of the European Union and third countries. In the present case, as has already been mentioned, the Convention does not contribute, first and foremost, to internal harmonisation, but primarily to external harmonisation.[124]

That means that Article 114 TFEU is not the right legal basis to conclude an international agreement aiming for the level playing field. However, that provision is relevant to adopt Union legislative acts the application of which is extended to subjects of third countries in order to restore the level playing field. This is therefore the object of a discourse of a 'geopolitical' European Commission which uses the territoriality of Union law and the attractiveness of the internal market.

The 'geopolitical' European Commission and the territoriality of Union law. 'My Commission will be a geopolitical Commission committed to sustainable policies'.[125] Ursula Von der Leyen clearly took a stance in favour of a geopolitical Commission when she was sworn in. Then the discourse is that of the European power, which one knows may not be military. The war of Russia against Ukraine has shown the limits of the European Union and the persisting ascendency of NATO. The common security and defence policy is still in its infancy. Louis-François Duchêne's intuition according to which Europe is a 'civil power' is quite remarkably modern.[126] Mandeville's tale of bees or Montesquieu's *doux commerce*, the trick of the functionalist reason of the common market has produced its pacifying effects on the European continent. Since the origins, the relations of the European Union with the rest of the world have been built on the free-trade doctrine. The Community and later the Union have always favoured a common trade policy which aimed at liberalising trade within the GATT and WTO's multilateral framework. The loss of impetus of multilateral-

122. See among others H.L. Buxbaum and T. Fleury Graff, *Extraterritoriality / L'extraterritorialité* (vol. 23, Centre for Studies and Research in International Law and International Relations Series, Brill 2022); E. Dubout, F. Martucci, F. Picod (dir.), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021); A. Miron, B. Taxil (dir.), *Extraterritorialité et droit international* (Pedone 2020); J. Scott, "Extraterritoriality and Territorial Extension in EU Law", (2014) vol. 62, N° 1, *The American Journal of Comparative Law*, 87-125; J. Scott, "The New EU Extrateritoriality", (2014) vol. 51, N° 5, *CML Rev.*, 1343-80; M. Cremona, J. Scott (eds), *EU Law Beyond EU Borders. The Extraterritorial Reach of EU Law* (OUP 2019).
123. Case C-137/12 *Commission v Council* [2013] Opinion of AG Kokott, para 59.
124. ibid, para 60.
125. Commission, 'The von der Leyen Commission: for a Union that Strives for More', 10 September 2019, Press release.
126. L.-F. Duchêne, 'Europe's Role in World Peace' in R. Mayne (ed.), *Europe tomorrow: sixteen Europeans look ahead* (Fontana 1972).

ism has been compensated for by negotiation and the conclusion of bi- and multilateral free trade agreements.

That the communication on the re-examination of the trade policy insists on the common strategic autonomy is revealing of a turning point of the European Union.[127] Gone are the days of a somewhat naive vision of free trade replacing the lifelessness of the common foreign and security policy.

> President von der Leyen's 'geopolitical Commission' aims to boost the role of the European Union (EU) on the world stage. The geopolitical context has shifted over the past decades, and there have been major technological and societal changes. The global economy is increasingly multipolar and the short-term pursuit of unilateral interests by specific actors can undermine effective multilateral cooperation.[128]

The Union must be more offensive in a multipolar world where the balance of power with foreign powers is being renewed.[129] To all appearances, the paradox is that of a Union ontologically based on peace which wants to take on a geopolitical dimension carrying a vision of the world founded on the defence of national interests via a civil and military instrumentalising of the territory. In his reference book, Floran Louis notes the desire for power of a 'non-bellicose geopolitical' power.[130] The virtues of the 'normative power' of Europe are then rediscovered[131] – an old discourse which has been renewed by the Brussels Effect.[132] The Union is no longer 'the norm without strength' according to Zaki Laïdi's idea.[133] On the contrary, it has become the norm-based power. The Union's geopolitics is that of the law. Classically, geopolitics refers to how politics 'acts on and with space', which becomes a territory as soon as it is claimed by man.[134] Lacking sovereignty, and therefore a territory, the Union nonetheless spreads out on a space that its law claims via territoriality.

It is legally false to talk of the territory of the Union. As Lydia Lebon has shown,

> The expression 'European Union's territoriality' has the advantage of inevitably implying an 'intermediation' by the territory of the Member State, since the Union cannot be thought of without its components. The emergence of a 'territoriality of the European Union' leads to the rebuilding of a link with the national territory, within the integrated framework of the Union. There is, in a way, a remodelling of the relations between the State, the individuals and the territory.[135]

Union law has a field of application, which is determined in Articles 52 and 355 TFEU, the instrumentation of which leads to territoriality. The latter is generally considered introspectively via integration law: it is the sign of the instrumentation of the exercise via Member States of its power on its territory to found the application and execution of Union law

127. Commission, *Trade Policy Review* (n 117) 66.
128. Commission, European economic and financial system: fostering openness, strength and resilience, COM/2021/32, 1.
129. See special issue: Les chemins de la puissance européenne (2021) Nº 3 Revue européenne du droit.
130. F. Louis, 'Quatre problèmes géopolitiques de la Commission géopolitique', Le Grand Continent, 8 September 2020. See F. Louis, *Qu'est-ce que la géopolitique* (PUF 2022).
131. I. Manners, 'Normative Power Europe: A Contradiction in Terms?', (2002) 40, Journal of common market studies, 235-58. A. Niemann, G. Junne, 'Europa als normative Macht?' in G. Simonis, H. Elbers (eds), *Externe EU Governance* (Springer VS 2011) 103-31.
132. P. Moscovici, 'Penser et construire l'Europe puissance' (2021) Nº 3 Revue européenne du droit, 71-74.
133. Z. Laïdi, *La norme sans la force, L'énigme de la puissance européenne* (Presses de Sciences Po 2008).
134. F. Louis, Qu'est-ce que la géopolitique, *op. cit.*, 45 and 51.
135. L. Lebon, 'Territoire(s) de l'Union européenne', *Répertoire de droit européen*, 2019, para 187.

on the territory of each Member State. On the one hand, the provisions of Union law are applied on the territory of Member States (*juridictio*); on the other, they are executed by national authorities and courts on the territory of each Member State (*imperium*) in keeping with 'executive federalism' or indirect administration, in the integrated legal order. That instrumentation, based on sincere cooperation which is consecrated in Article 4(3) TEU, compensates for the lack of public power of the Union.[136]

The geopolitical evolution comes from the projection of territoriality which is conceived as a means to attract, within the spectrum of Union law, rights holders which are attached to the territory of third countries. This is a debate on the so-called extraterritoriality of Union law which is not one. As Joanne Scott has shown, Union law does not practice extraterritoriality in the sense of a measure applied thanks to an non-territorial connection with the State ('The application of a measure triggered by something other than a territorial connection with the regulating state').[137] It favours a 'territorial extension' in the sense that the provision of Union law governs a situation which is outside the Union but has a territorial connection with the latter ('The application of a measure is triggered by a territorial connection but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad').[138] Reading through the prism of territoriality then allows to avoid the pitfall of public international law which Union law must respect according to the Court of Justice.[139] Since in public international law 'the theory of competences is not enough to understand today's practices of extraterritoriality', it is necessary to base the title of competence on a connecting link.[140] In Union law, it is therefore necessary to found the applicability of a provision to the subject of a third country on a 'sufficient connecting link' or a 'tight link' to the territory of a Member State, in accordance with the fundamental principle of territoriality which derives from public international law.[141] As we have written, in Union law, a 'situational approach' has been chosen,[142] which is understood as founding the applicability of the provision via the link of a fact situation, which is subjective – for it is that of a right holder – and can be tailored, to the integrated legal order of the Union.[143] For lack of connection, the situation is purely external if none of its elements can be linked to a Member State.

Attractiveness of the internal market. All the strength of the Brussels Effect is in the Union law's capacity to use the internal market to found a connection to the Union's legal order. As underlined by Anu Bradford, 'The EU has become a global regulator not only because of the size of its internal market, but also because it has built an institutional architecture that has converted its market size into a tangible regulatory influence'.[144] *De facto*, the internal market produces an attractive effect on economic actors which would like to access it

136. M. Blanquet, *Droit général de l'Union européenne* (11th edn, Sirey 2018) 610ff.
137. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 122) 90. See also J. Scott, 'The New EU Extraterritoriality' (n 122); M. Cremona, J. Scott (eds) *EU Law Beyond EU Borders* (n 122).
138. J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' (n 122) 90.
139. Case C-286/90 *Poulsen et Diva Navigation Corp* [1992], *Rec.* p. I-6019, para 9.
140. A. Miron, B. Taxil, 'Les extraterritorialités, entre unilatéralisme et multilatéralisme, l'*imperium* sans le *dominium*' in A. Miron, B. Taxil (dir.), *Extraterritorialité et droit international* (Pedone 2020) 27.
141. Case C-413/14 P *Intel Corporation Inc.* [2017], Opinion of AG Wahl, para 284. See also Case C-366/10 *Air Transport Association of America* [2011], Opinion of AG Kokott, paras 148-149.
142. ibid.
143. See F. Martucci, 'Dans quelle mesure un acte de droit dérivé de l'Union est-il applicable aux entreprises de pays tiers? Quelques précisions juridiques sur le "Brussels effect"' in E. Dubout, F. Martucci, F. Picod (dir.), *L'extraterritorialité en droit de l'Union européenne* (Bruylant 2021).
144. A. Bradford (n 2), 25.

as an outlet for their activities; *de jure*, the exercise of an economic activity producing an effect on the internal market is understood by Union law as a connecting element. That the issue is linked to the internal market is determining since the objective is to ensure a level playing field among European economic actors and those of third countries. Concretely speaking, by escaping the constraints weighing on European companies because of the law of the internal market, the companies of third countries have a competitive advantage. That is why submitting all the companies to the same rules allows to restore fair competition conditions.

It is no coincidence that competition law was one of the first domains in which applicability to the businesses of third countries has been chosen. Pursuant to *Béguelin*, *ICI Matières colorantes*, *Continental Can* and *Pâtes de bois*, as specified in the *InnoLux Corp.* and *Intel* decisions,[145] Articles 101 and 102 TFEU on anticompetitive practices apply to the businesses of third countries when two alternative criteria are met: 1) the criterion of the implementation implies the implementation of the practice on the territory of one or several Member States; 2) the criterion of the qualified impact means production, by the practices, of foreseeable, immediate and substantial effects in the internal market.[146]

Connecting link. The requirement of a connecting link in order to extend the applicability of European rules is found in other branches of Union law, which, like tax matters,[147] the transport sector,[148] or protection of personal data,[149] are characterised by a transnational projection of the activities in question. Thus, the challenge is to identify the connecting link to the internal market which reveals the attractiveness of the latter for the companies of third countries. Advocate General Léger has already asserted that the existence of a territorial link is characterised 'either through the actual presence of one of the economic operators in the territory of a Member State, or through the pursuit of an economic activity in that territory'.[150]

The tight link with the internal market is characterised when the operator is present on the territory of a Member State, a case that we have called an active economic activity on the territory of Member States.[151] First, the unity may be found within a group of companies. The provisions of secondary law apply in the companies of third countries which are established through the creation of subsidiaries in the Union. For example, pursuant to its Article 1, Directive MiFid II '[applies] to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union'.[152] Similarly, the CSRD has submitted the subsidiary established on their territory the mother company of which is governed by the law of a third country to the requirement of sustainability reports

145. Case 22/71 Béguelin Import [1971], para 11; Case 48-69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972], Opinion of AG Mayras, para 11; Case 6-72 Europemballage Corporation and Continental Can Company Inc. v Commission, [1973], Rec., 215; Joined Cases 104, 114, 116, 117 and 125-129/85 A. Ahlström Osakeyhtiö e. a. v Commission, [1988], Rec., para 16; Case C-231/14 P InnoLux Corp. v Commission [2015]; Case C-413/14 P (n 140).
146. To be precise, in competition law, the effect is assessed in the Union and the European Economic Area.
147. Case C-482/18 *Google Ireland Ltd* [2020], Opinion of AG Kokott, paras 44-45.
148. Case C-366/10 (n 140), para 124.
149. Case C-131/12, *Google Spain SL* [2014], para 54.
150. Case C-381/98, *Ingmar GB Ltd* [2000], Opinion of AG Léger, para 37.
151. F. Martucci (n 143).
152. European Parliament and Council Directive 2014/65/EU (n 97), Article 1. See P. Davies, 'Financial Stability and the Global Infuence of EU Law' in M. Cremona, J. Scott (eds) (n 121), 174-95.

at the level of the group of the ultimate mother company of the third country.[153] In the *Google Spain* case, the Court of Justice has estimated that Directive 95/46/CE on the protection of individuals with regard to the processing of personal data and on the free movement of such data applied to the American company Google Search, the main part of the commercial activity of which is constituted by the promotion and sale of advertising space, managed here by Google Spain. Then, the processing of the data in question was conducted 'within the framework of the activities' of the Google group so that the connection was indeed established.[154] Similarly, in a case that did not lead to a decision of the Court of Justice, the United Kingdom challenged the violation of the principle of territoriality by CRD IV[155] on the ground that it applies to entities at 'group, parent company and subsidiary' levels, including those established in offshore financial centres established outside the Union as a whole. The advocate general had set aside that means, considering that 'Such universal jurisdiction is not sought by the relevant provisions of the CRD IV Directive but only subjection of foreign group companies of EU financial institutions to the EU regulatory framework'.[156] Second, economic unity may be characterised by contractual relations. The most fully developed illustration of this is to be found in the *Ingmar* case: the Court of Justice has considered that a directive on independent commercial agents applies to a principal established in a third country the commercial agent of which exercises its activity inside the Union, since said directive aims to protect, through the category of commercial agents, the freedom of establishment and the play of a fair competition in the internal market.[157] Indeed, it is excluded that, thanks to a contractual stipulation, two operators escape the field of application of an act of secondary legislation by submitting themselves to the law of a third country, as in the *Ingmar* case in which a British company had concluded a contract with an American one stipulating their submission to Californian law.[158] It is interesting to note that a reference was already incidentally made to the level playing field. Third, the legislator of the Union may induce the creation of a connecting link from a third-country company by requesting that an intermediary be located in the Union. It is what happens when companies from third countries must designate a legal representative acting as a point of contact in the Union as is seen in the *Digital Services Act*.[159]

The Union legislator has consecrated another connecting criterion characterised by the presence, on the territory of a Member State of the Union, of customers of the third-country company. For example, Directive 2012/19/EU applies to waste electrical and electronic equipment which has been sold especially 'by means of distance communication directly to private households or to users other than private households in a Member State', by any

153. European Parliament and Council Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) N° 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting [2022], OJ L 322, Article 40 *bis*.
154. Case C-131/12 *Google Spain SL* [2014], para 55: 'The processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.'
155. European Parliament and Council Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013], OJ L 176, 338.
156. Case C-507/13 *United Kingdom v European Parliament and Council*, Opinion of AG Jääskinen, para 39.
157. Case C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc [2000], paras 24-25.
158. *Ingmar* (n 156).
159. European Parliament and Council Regulation (EU) 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022], OJ L 277, 1, Art. 11.

natural or moral person 'established in another Member State or in a third country'.[160] Similarly, the Alternative Investment Funds Directive on alternative investment funds not only applies to 'EU AIFMs which manage one or more AIFs irrespective of whether such AIFs are EU AIFs or non-EU AIFs' but also to 'non-EU AIFMs which manage one or more EU AIFs' or even to 'non-EU AIFMs which market one or more AIFs in the Union irrespective of whether such AIFs are EU AIFs or non-EU AIFs'.[161] The legislator no longer hesitates to base the criterion of the connection on the location of the beneficiary of a service in the Union in order to apply an act to the operators established in third countries. Thus, the *Digital Services Act* '[applies] to intermediary services offered to recipients of the service that have their place of establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of establishment'.[162] The service is offered in the Union if it allows people in one or several Member State(s) to 'use the services of a provider of intermediary services that has a substantial connection to the Union', the latter being established if there is a connection of 'a provider of intermediary services with the Union resulting either from its establishment in the Union or from specific factual criteria, such as: – a significant number of recipients of the service in one or more Member States in relation to its or their population; or – the targeting of activities towards one or more Member States'.[163] Taking that logic further, the legislator also draws from the solicitation action of a third country a substantial link while excluding that link in case of passive attitude, ie, when the company is solicited by the client. Thus, Directive Mifid II applies '[if] a third-country firm solicits clients or potential clients in the Union or promotes or advertises investment services or activities together with ancillary services in the Union, it should not be deemed as a service provided at the own exclusive initiative of the client'.[164] The most efficient means to characterise the connecting link with the internal market is still the turnover of the companies in question. The substantial link indeed results from a logic according to which the higher the turnover in the Union the more significant the environmental and social impact of the activities of the third country on the internal market. Provided for in the regulation on the control of concentrations to establish the Community character of the operation in question, that criterion is present in other legislative acts. That is especially the case of the draft directive on the duty of due diligence, one provision of which should provide for its application to companies that have been constituted in compliance with the legislation of a third country and which fulfil a condition related to the realisation of a turnover of a certain amount in the Union.[165]

On the contrary, though they may be legally possible, other links should be set aside for opportuneness reasons. That is the case in particular for the use of a currency to support a transaction realised by persons established outside the territory where it is issued. The circumstance that a transaction is written in Euros should not allow to characterise a connecting link with the integrated legal order of the Union. Admittedly, the United States has used the Dollar as a connecting element, especially to sanction European banks, on the ground

160. European Parliament and Council Directive 2012/19/EU of 4 July 2012 on waste electrical and electronic equipment (WEEE) (recast) [2012], OJ L 197, Art. 3(1)(f).
161. European Parliament and Council Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) N° 1060/2009 and (EU) N° 1095/2010 [2011], OJ L 174, 1.
162. Regulation (EU) 2022/2065 (n 158), Art. 2.
163. ibid Art. 3(e).
164. Directive 2014/65/EU (n 97), Rec. 111.
165. European Parliament and Council Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71, Article 2(5).

that the payment operations passed through payment systems on the American soil.[166] Not only does this raise issues regarding public international law,[167] but it may harm the Euro as an international currency.[168] Indeed, companies may renounce using the Euro in their international transactions, thus harming the international role of the European currency. The criterion of the number of employees employed in the Union should also be excluded. First, such a criterion is ill-adapted to connect to the internal-market companies the activities of which only require a very limited number of employees in Member States, given the digital nature of the services provided and the intermediation provided by independent operators. Second, that criterion has a perverse effect since the multinational may avoid employing people in the Union. Last, though the language criterion has been considered by Advocate General Kokott,[169] it is not relevant either to found a substantial link given the generalised use of the English language.

The projection of values. Behind the discourse of the level playing field and beyond the economic aspects of restoration of competition conditions among European and third-party companies, there is a political will. The idea is to use Union law to spread European values at a global scale. In other words, the objective is to force third-country companies to respect non-economic rules which give tangible form to the values of Article 2 TEU.

The most characteristic example is that of Regulation (EU) 2020/1998 on restrictive measures against serious human rights violations and abuses which applies, pursuant to Article 19, to 'any legal person, entity or body in respect of any business done in whole or in part within the Union'.[170] That regulation allows the Council to impose restrictive measures on any entity, including companies, which commits serious violations of fundamental rights outside the territory of Member States. However, only the most serious violations such as genocide, crimes against humanity, torture, slavery, etc. are included, as well as systematic violations and those having a particular serious character like human trafficking, sexual and gender-based violence, violation of the freedom of peaceful assembly and association, freedom of thought and expression or freedom of religion or belief. That regulation is therefore only meant to apply in exceptional circumstances.

The Union's will to promote its values at a global scale is especially obvious in the discourse about supply chains. That notion, with which economists are familiar, is making progress among jurists. The preparatory work started by the European Commission in 2020 about the revision of the CSRD,[171] the proposal for an initiative on sustainable corporate governance,[172] or the draft legislative act on due diligence are quite revealing in this

166. R. Bismuth, 'Au-delà de l'extraterritorialité, une compétence économique' in A. Miron, B. Taxil (n 122) 120-21. See also E. Breen, 'La compétence américaine fondée sur le dollar: réalité juridique ou construction politique?' (2020) N° 1 Revue européenne du droit, 55-61.

167. R. Bismuth (n 166), 120.

168. Banque de France, 'Le rôle international de l'euro', Bulletin de la Banque de France N° 229, 2020; ECB, *The International Role of the Euro*, June 2020.

169. Case C-482/18 *Google Ireland Limited* [2020], Opinion of AG Kokott, paras 48ff.

170. Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuse [2020], OJ L 410I, 1.

171. European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014], OJ L 330, 1.

172. Consultation document, Proposed Initiative on sustainable corporate governance, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation/>

regard.[173] In that respect, the European Parliament underlined in 2020 all the paradox of globalisation:

> The growth of international supply chains has undoubtedly brought enormous benefits to developing countries, but at the same time it has had certain negative impacts, relating for instance to violations of human and labour rights, including forced labour and child labour, environmental damage, land grabbing, and corruption.[174]

The rhetoric of the supply chain is therefore tightly linked to the level playing field. The objective is to counter the strategies of multinational companies which exploit the weakness of the legal systems of developing countries.[175] The companies, which are established in third countries, delocalise their production to other States which do not belong to the Union and where the environmental, social, tax rules etc. are less stringent in order to offer their goods and services on the internal market. Then the legislator of the Union intends to restore the fair competition conditions by making access to the internal market conditional on those multinational businesses respecting the European rules. One of the revealing examples of that approach to Union law is given in the directive on due diligence which consecrates the notion of 'value chain' understood as 'activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company'. The Commission has indicated in the explanatory memorandum that

> Union legislation on corporate due diligence would advance respect for human rights and environmental protection, create a level playing field for companies within the Union and avoid fragmentation resulting from Member States acting on their own. It would also include third-country companies operating in the Union market, based on a similar turnover criterion.[176]

Another example could be the regulation on 'deforestation',[177] the adopted version of which does not mention the level playing field. However, in its draft, the Commission has indicated it intends 'to ensure a level playing field and a common understanding of deforestation free supply chains, in order to increase supply chain transparency and minimise the risk of deforestation and forest degradation associated with commodity imports in the EU'.[178] Indeed, supply chains of wood products are, as the Commission underlines, 'inter-

173. Commissioner Reynders, Speech in RDC webinar on due diligence, April 30, 2020, <https://responsiblebusinessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>
174. European Parliamentary Research Service, Towards a mandatory EU system of due diligence for supply chains, October 2020: 'The growth of international supply chains has undoubtedly brought enormous benefits to developing countries, but at the same time it has had certain negative impacts, relating for instance to violations of human and labour rights, including forced labour and child labour, environmental damage, land grabbing, and corruption'.
175. ibid.
176. European Parliament and Council (n 164).
177. European Parliament and Council Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) N° 995/2010 [2023], OJ L 150, 206.
178. European Parliament and Council Proposal for a Regulation on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) N° 995/2010, COM/2021/706.

national and very often global' so that 'it is instrumental to ensure a level playing field for operators in terms of requirements to be met before placing products (commodities and derived products) on the EU market for the first time'.[179]

While the extended territoriality of some provisions of Union law is purported to promote the values of the Union, it is part of the approach aiming to restore fairness in the internal market.

B. The restored fairness in the internal market via split public action

When it is used, the expression 'level playing field' regularly refers to the idea of fairness. It is always risky to try and give a definition of fairness since the notion generally extends beyond the the law, taking on an opportunistic hue. However, when it is associated with the discourse on the level playing field, couldn't fairness be a notion on its own, its formation being visible in Union law? The idea is that in order to restore fair competition conditions, the Union must act in a way which corrects the disruption of the internal market resulting from the offers of third countries which it is perceivable are not made in normal market conditions. That action mainly takes the form of trade defence instruments. However, the arsenal of the Union and Member States is being enriched with new instruments, which make the 'level playing field' meaningful.

Anti-dumping. Anti-dumping law has been one of the first domains in which a Community action has been justified on the ground of trade defence. Dumping is characterised by a third-party company's export into a Member State of a good at a lower price than the normal value of the good on the internal market. If an investigation determines that third-country importers have practised dumping harming the industry of the importing Member State, anti-dumping measures may be adopted, such as the application of an *ad valorem* duty based on the transaction value, specific duties established per specific amount of the good or even the exporter's anti-dumping minimal price undertakings. Anti-dumping law, though it is linked to competition law, is different from it, as Damien Reymond has shown in his PhD. He states that that law belongs to a logic of fight against unfair competition, of which he distinguishes two meanings: according to an 'ethical or moral' conception, fairness concerns contractual relations, while a 'fair or even egalitarian [conception] (…) implies some homogeneousness of competition conditions, which is expressed in the English expression *level playing field*'.[180]

This is how the expression of fair competition conditions is used in some regulations on antidumping. The aim is indeed to 'restore the level playing field'[181] in the internal market

179. ibid.
180. D. Reymond, *Action antidumping et droit de la concurrence dans l'Union européenne*, Préface L. Idot (Bruylant 2015) 102.
181. Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China [2022], OJ L 36, 1, para 500; Council Regulation (EC) Nº 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) Nº 384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia [2008], OJ L 75, 14, para 16. See also Council Regulation (EC) Nº 1987/2005 of 2 December 2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of granular polytetrafluoroethylene (PTFE) originating in Russia and the People's Republic of China [2005], OJ L 320, 1, para 141; Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a ➤

because it has 'been distorted by the unfair trade practises of (…) exporters'.[182] Anti-dumping measures have then been justified by the will to 'eliminate the impact of distorted market conditions arising from the presence of dumped imports'[183] or 'combat the unfair trade practices and to remedy to some extent the distorting effects of dumped imports'.[184] As an instrument of trade defence, anti-dumping law is therefore not designed to 'close the Community market from third country imports'[185] nor to 'prohibit imports nor to hamper the activities of the importers in the Community'.[186] The re-establishment of fair competition conditions rather purports to protect the economic actors established in the internal market. An objective could be to 'ensure the viability of these producers, while encouraging the emergence of new ones',[187] to help not only Union producers but also other supply sources which are not dumped benefit from it.[188] More generally, anti-dumping measures allow Union producers to increase their sales in order to enhance the profitability of the Union industry and prevent job losses.[189] The aim is to restore fair competition conditions in the Union market and allow the Union industry to improve by increasing its profitability.[190]

Anti-dumping law then has an ambiguous relation with competition law. Their relations belong more to a logic of intersection than articulation. Ensuring fair competition conditions does not necessarily mean ensuring competition order. In particular, anti-dumping measures may lead to an increase in the price that is necessary to the restoration of fair competition conditions:[191] for example, it was decided to 'restore prices to a non-subsidised level in order to allow all producers to operate on the Union market under fair trading

provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India [2015], OJ L 244, 25, para 115. Commission Implementing Regulation (EU) N° 1195/2014 of 29 October 2014 imposing a provisional countervailing duty on imports of certain rainbow trout originating in Turkey [2014], OJ L 319, 1, para 202. Commission Regulation (EC) N° 1827/2001 of 17 September 2001 imposing a provisional anti-dumping duty on imports of certain zinc oxides originating in the People's Republic of China [2001], OJ L 248, 17, para 124.

182. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, para 105.
183. ibid.
184. Council Regulation (EC) N° 716/2006 of 5 May 2006 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China [2006], OJ L 125, 1, para 115.
185. ibid Council Regulation (EC) N° 238/2008 (n 180), para 16.
186. Council Regulation (EC) N° 258/2005 of 14 February 2005 amending the anti-dumping measures imposed by Regulation (EC) N° 348/2000 on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Croatia and Ukraine [2005], OJ L 46, 7, para 117.
187. Council Regulation (EC) N° 368/98 of 16 February 1998 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China and collecting definitively the provisional duty imposed, [1998], OJ L 47, 1, Rec. 53.
188. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, Rec. 105.
189. Commission Implementing Regulation (EU) 2015/1559 of 18 September 2015 imposing a provisional anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India [2015], OJ L 244, 25, Rec. 115.
190. Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia [2017], OJ L 258, 24, para 423.
191. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 24, para 874.

conditions'.[192] The Court for example considers that reference to the establishment of fair conditions with third-country competitors does not mean 'Community producers are vulnerable because of their cost structure' but '[refers] to the abnormally low prices charged by the third-country exporting producers'.[193] The autonomy of anti-dumping law vis-à-vis competition law may also be seen when the Commission declares that the fact that the Union industry has resorted to cartelisation does result in depriving it of the right to get compensation for unfair trade practices.[194] At the same time, 'Ensuring a level playing field for the Community industry (…) also guarantees a higher degree of competition between various suppliers (…) market'.[195] This leads to avoiding the evictions, at a European level, of operators from the market: the Council has for example considered that

> should the Community industry of TCS disappear as a consequence of the elimination of the anti-dumping measures in force, this would undoubtedly lead to a reduction in competition and to the dependence of Community TCS users on Japanese technology. The latter aspect is particularly important as producers of TCS can play an important role in setting future broadcasting standards. The Community would undoubtedly be in a disadvantageous situation should it not have a sufficiently strong producer of this product.[196]

It is in general to establish the Union industry's interest in anti-dumping measures that the restoration of fair competition conditions is invoked. These measures indeed allow to compensate for the harm suffered by the industry of the European Union and the establishment of fair price.[197] Similarly, commitments may be refused on the ground that they may not restore fair competition conditions in the internal market by eliminating dumping and its harmful effects.[198]

Subsidies. Among the instruments of trade defence, there is also Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European

192. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia, [2022], OJ L 88, 24, para 1046.
193. Case T-192/08 Transnational Company 'Kazchrome' AO and ENRC Marketing AG v Council [2011], para 143.
194. Commission Regulation (EC) N° 1009/2004 of 19 May 2004 imposing a provisional anti-dumping duty on imports of certain graphite electrode systems originating in India [2004], OJ L 183, 61, para 105.
195. Council Regulation (EC) N° 716/2006 of 5 May 2006 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, [2006], OJ L 125, 1, para 115.
196. Council Regulation (EC) N° 1910/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of television camera systems originating in Japan following an expiry review pursuant to Article 11(2) of Council Regulation (EC) N° 384/96 [2006], OJ L 365, 7.
197. Council Regulation (EC) N° 771/98 of 7 April 1998 imposing a definitive anti-dumping duty on imports of tungsten carbide and fused tungsten carbide originating in the People's Republic of China, [1998], OJ L 111, 1, para 64.
198. Commission Regulation (EEC) N° 129/91 of 11 January 1991 imposing a provisional anti-dumping duty on imports of small-screen colour television receivers originating in Hong Kong and the people's Republic of China, [1991], OJ L 14, 31, para 58. Council Regulation (EEC) N° 1048/90 of 25 April 1990 imposing a definitive anti-dumping duty on imports of small-screen colour television receivers originating in the Republic of Korea and collecting definitively the provisional duty [1990], OJ L 107, para 40.

Union.[199] It is designed to integrate into Union law the rules that have been provided for in the agreement on subsidies concluded within the framework of the WTO. Thus, in compliance with international rules, the Union can impose 'countervailing duty (…) to offset any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Union causes injury'.[200] The subsidy is composed of a financial contribution of the public authorities of the country of origin or export and may thus be subject to compensatory measures when it has a character that is specific to a company or an industry. What needs to be calculated next is the compensatory duty which corresponds to the advantage granted to the beneficiary company or industry. The regulation then is designed to restore equality among third-country and State operators. However, it does not contain the expression 'fair competition conditions'. At best, Article 12 provides that the measures must be taken if 'the Union interest calls for' them and that therefore what will be appraised is 'all the various interests taken as a whole, including the interests of the domestic industry and users and consumer (…), the need to eliminate the trade-distorting effects of injurious subsidisation and to restore effective competition shall be given special consideration'.[201]

It is however interesting to note that there is an instance of the fair competition conditions in the implementing decisions adopted starting from 2019. The Commission refers to them to justify the interest in compensatory measures of the Union industry,[202] independent

199. European Parliament and Council Regulation (EU) 2016/1037 of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016], OJ L 176, 55.

200. ibid, Art. 1, para 1.

201. ibid, Art. 31.

202. Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China [2019], OJ L 16, 5, para 728: 'The Commission expects that the imposition of a countervailing duty will allow all producers to operate under conditions of fair trade on the Union market. In the absence of measures, a further deterioration of the Union industry's economic and financial situation is very likely'. Commission Implementing Regulation (EU) 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council [2019], OJ L 116, 39, para 273: 'The continuation of measures would allow the Union industry to further exploiting its potential on a Union market that is a level-playing field'. Commission Implementing Regulation (EU) 2017/969 of 8 June 2017 imposing definitive countervailing duties on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2017/649 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in the People's Republic of China [2017], OJ L 146, 17, para 598: 'the imposition of definitive countervailing duties will restore fair trade conditions on the Union market, enabling the Union industry to further recover. (…) It is therefore important that prices be restored to a non-subsidised or a non-injurious level in order to allow all various producers to operate on the Union market under fair trade circumstances'.
(599) The Commission therefore concluded that imposing definitive countervailing duties would be in the interest of the Union.

exporters[203] or Union users and importers.[204] In other decisions the Commission notes that, in accordance with the 'trade-distorting effects of injurious subsidisation' and '[restoration of] effective competition' within the meaning of Article 31(1) of Regulation (EU) 2016/1037, the subsidies in question deprive the Union industry of fair competition conditions.[205] The latter are also taken into consideration in the calculation of the injury elimination duty. For example, the Commission has considered that the amount of duty 'should allow the Union industry to cover its costs of production and obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, ie, in the absence of subsidised imports, on sales of the like product in the Union'.[206] Last, and more generally, the Commission has relied on the fair competition conditions to decide the harm suffered in the Union. Thus, it has accepted the argument of '[restoring] prices to a non-subsidised level in order to allow all producers to operate on the Union market under fair trading conditions'[207] or even that according to which the Union industry prices have diminished while 'under conditions of fair competition, they would have been expected to increase at a ratio comparable to rise of the cost of production'.[208] It is thus

203. Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022], OJ L 12, 34, para 741: 'In any event, the investigation has shown that one of the important facets of injury in this case is precisely the fact that, due to Chinese dumped imports, Union industry could not achieve the level of profits that would enable it to continue to invest *inter alia* in further capacity to meet the growing demand on the expanding Union market. The expected impact of measures is precisely to restore a level playing field and allow for such profits, investment and expansion of capacity to take place'.
204. Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163 [2018], OJ L 283, 1, para 884: 'The Commission considered that there was sufficient overall capacity in the Union to supply the internal market (…) Moreover, there are many producers located in third countries (Turkey, South Korea, Japan, Russia, Thailand, and many other countries) who are already selling to the Union market. Their combined sales volumes during the period considered were relatively stable, with a market share of around 12%. The Commission recalled that the Chinese prices were well below the prices of all other major importing countries, according to Eurostat the average import price from China was 128,8 EUR/item, while the import prices from all other countries were 189 EUR/item in the investigation period. Therefore, it can be reasonably expected that once the level playing field is restored in the Union market, imports from all countries will provide for the necessary supply'.
205. Commission Implementing Regulation (EU) 2020/379 of 5 March 2020 imposing a provisional countervailing duty on imports of continuous filament glass fibre products originating in Egypt [2020], OJ L 69, 14, para 209; Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia [2019], OJ L 212, 1, para 393.
206. Commission Implementing Regulation (EU) 2019/244 of 11 February 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Argentina [2019], OJ L 40, 1, para 495.
207. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless-steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless-steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 24, para 1046.
208. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia [2022], OJ L 88, 162, para 1005.

patent that there is a link between trade distortion, unfair competition advantage and fair competition conditions in the implementation of Regulation (EU) 2016/1036. To sum up, the Commission has underlined that

> Subsidisation by third countries is an increasing concern and it is important to show that where such practices cause harm to Union producers, they are tackled robustly. By imposing countervailing measures at a level that fully reflects the amounts of subsidisation, the EU shows that it addresses the serious damaging effects of this unfair trade practice rigorously, and also ensures adequate protection of the EU industry and level playing field.[209]

Though it is at the service of fair competition conditions, Regulation (EU) 2016/1036 is however ineffective when foreign subsidiaries take the form of subsidised investments or when financial services and flows are involved. As to the WTO agreement on subsidies and compensatory measures, not only does it only apply to agricultural products and industrial goods, but dispute resolution between States is neutralised for political reasons. That is why a 'new tool to effectively deal with distortions in the internal market caused by foreign subsidies in order to ensure a level playing field'[210] has been created. The legislator expressly states that that instrument has been designed to restore the level playing field among European and third-country companies since the former have to comply with competition law – in particular to State-aid law – while the latter are not subject to the same rules. The regulation on 'foreign subsidies' is much more ambitious than Regulation (EU) 2016/1036. The double legal basis which links the instrument to the internal market (Article 114 TFEU) as well as to trade common policy (Article 217 TFEU) is quite significant in that respect. The extended territoriality of Union law plays its full role since the regulation applies to third-country companies when they conduct an economic activity in the internal market. The 'anti-subsidies' regulation is quite remarkable as it gives the Commission the power to impose concrete corrective measures to restore fair competition conditions. To this end, it is necessary to establish that a financial contribution granted by a third country to a company causes competition distortions. Though the notion of foreign subsidy is classic, the regulation has the advantage of consecrating gradual presumptions of competition distortion. It sets the indicators with regard to which the subsidy is assessed: the amount, its nature and purpose, the situation of the company in relation to the market in question or the level and evolution of the economic activity of the company in the internal market.[211] A gradation of the amount is provided for and allows to set aside the subsidies which do not involve distortions or are little likely to distort the internal market.[212] Conversely, the categories of foreign subsidies which are most likely to distort the market are identified.[213] The

209. Commission Communication to the European Parliament and the Council on the revised lesser duty rule in anti-dumping and anti-subsidy investigations in the EU A review and evaluation of the application of Articles 7(2a), 8(1) and 9(4) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 and of the third and fourth subparagraphs of Article 12(1), the third and fourth subparagraphs of Article 13(1), and of the third and fourth subparagraphs of Article 15(1) of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016, COM/2023/294.
210. European Parliament and Council Regulation (EU) 2022/2560 (n 6), Rec. 6.
211. Regulation (EU) 2022/2560 (n 6), Art. 4(1).
212. Regulation (EU) 2022/2560 (n 6), Art. 4(2).
213. Regulation (EU) 2022/2560 (n 6), Art. 5(1): 'A foreign subsidy: (a) [is] granted to an ailing undertaking, (…) (b) (…) in the form of an unlimited guarantee for the debts or liabilities of the undertaking, (…); (c) an export financing measure that is not in line with the OECD Arrangement on officially supported export credits; (d) (…) directly facilitating a concentration; (e) (…) enabling an undertaking to submit an unduly advantageous tender on the basis of which the undertaking could be awarded the relevant contract'.

logic is not purely economic however. Indeed, Article 6 of Regulation (EU) 2022/2560 specifies that it is for the Commission to balance the negative and positive effects of a foreign subsidy. The negative effects are those which result from the implementation of the presumptions of Articles 4 and 5 of the Regulation. The positive effects come from both the impact of the development of the subsidised economic activity on the internal market and of the pursued relevant strategic interests. The aim is to entrust the Commission with a broad power of appreciation to determine whether a foreign subsidy involves a competition distortion which allows to reconcile economic requirements and political interests. If that is the case, the companies may present commitments that the Commission may accept, in accordance with Article 7 of the Regulation. Compliance with commitments is then monitored by the Commission. If the company does not offer commitments or if they are not accepted by the Commission, the latter may impose compensatory measures. They and the commitments are explained in an open list set by Article 7 (4) of the Regulation according to which what is to be imposed is access to essential infrastructures (access on fair, reasonable and non-discriminatory conditions to infrastructures obtained thanks to foreign subsidies or the granting of licences on fair, reasonable and non-discriminatory terms for the assets obtained or developed thanks to foreign subsidies), requirement of the reduction of capacities or presence on the market, including via a temporary reduction of the commercial activity, prohibition of some investments, etc. Two specific controls are added to the rules of the internal market. For the companies benefiting from foreign subsidies implying competition distortions, the regulation provides for, on the one hand, the supervision of the specific concentrations and, on the other, conditional access to public markets in the European Union.[214] Without giving a detailed analysis of the system of the regulation on 'foreign subsidies', it is interesting to note its hybrid nature. On the one hand, it clearly borrows from competition law instruments with regard to commitments and compensatory measures as well as the conducted proceedings. On the other, it is not limited to a purely competitive or even economic logic but shows political or even geopolitical priorities. This translates into a sort of division of the supervision of concentrations and public procurement.

Concentrations. While the monitoring of concentrations is an instrument of competition law, it may take on a geopolitical meaning. Admittedly, the Commission is competent to assess the operations of concentration which involve third-country companies on the condition they have a 'Community dimension' which is determined based on turnover thresholds.[215] Thus, the Court of First Instance of the European Communities has interpreted the previous regulation on concentrations as not excluding from its field of application the 'concentrations which, while relating to mining and/or production activities outside the Community, have the effect of creating or strengthening a dominant position as a result of which effective competition in the common market is significantly impeded'.[216] However, for the regulation to respect the principle of territoriality, in the sense of public international law, the Court has required that the three criteria of the immediate, substantial and foreseeable effect be present in the case at hand.[217] Article 2 of Regulation (CE) N° 139/2004 nevertheless limits the assessment of accountability to considerations of pure competition

214. See infra.
215. Council Regulation (EC) N° 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004], OJ L 24, 1.
216. Case T-102/96 *Gencor Ltd v Commission* [1999], *Rec.* p. II-753, para 82; D. Berlin, 'Concentrations: chronique d'actualité', *RTD eur.*, 2001, para 68.
217. Case T-102/96 (n 215), para 92.

and the assertion of a theory of *efficiencies* does not solve the recurrent debate on the extension of the supervision of concentration to public interest grounds. The monitoring of foreign subsidies is therefore especially significant when operations of concentrations are involved. That explains why a *lex specialis* has been consecrated in Chapter 3 of the regulation on foreign subsidies distorting the internal market in the context of concentrations. The *ex ante* supervision as provided for in Regulation (CE) Nº 139/2004 is copied, with a few adaptations. The main difference lies in the thresholds which, for foreign subsidies, are different from Article 1 of Regulation (EC) Nº 139/2004.[218] Pursuant to the regulation on foreign subsidies, the companies in question must notify the Commission of the operation of concentration, the control of that operation taking full consideration of the granting of foreign subsidies involving a distortion of competition. The companies may offer commitments to the Commission to compensate for it, and if the latter does not accept them, it may impose corrective measures.

Public procurement. Though it is rarely mentioned, public procurement law is guided by a level playing field logic. Subjecting the conclusion of public procurement and concessions to harmonised rules in order to guarantee transparency and competition aims to ensure fair competition conditions among the economic operators established in the Member States. Public procurement law involves a form of reverse discrimination to the detriment of the European Union which benefits third-country businesses. Pursuant to Article 25 of Regulation 2014/24/EU on public procurement, third-country economic operators must receive a less favourable treatment than that of Union economic operators insofar as the external agreements concluded by the Union provide for it. The European Union is party to the WTO-based Agreement on public procurement concluded in 2012 and is therefore linked to 19 other third countries which are also parties to that agreement.[219] Within a bilateral framework, some free-trade agreements, like those concluded with Canada, Japan or the United Kingdom, also include stipulations on public procurement. Thus, Union law provides for an opening of public procurement within the European Union to offers of foreign operators. There is therefore a risk that some economic operators which have benefited from foreign subsidies bid for public procurement and concessions organised in the Member States of the European Union, so that they may present offers at lower prices than those of the European companies. That is why the Union legislator has adopted two instruments allowing to restore the level playing field.

First, the Regulation on the International Procurement Instrument sets the proceedings allowing the Commission to investigate claims of measures or practices of third countries against Union economic operators of goods and services and to start a dialogue with the

218. Regulation (EU) 2022/2560 (n 6): 'At least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million; and (b) the following undertakings were granted combined aggregate financial contributions of more than EUR 50 million from third countries in the three years preceding the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest: (i) in the case of an acquisition, the acquirer or acquirers and the acquired undertaking; (ii) in the case of a merger, the merging undertakings; (iii) in the case of a joint venture, the undertakings creating a joint venture and the joint venture'.

219. Are parties: Armenia; Australia; Canada; South Korea; the United States; Hong Kong, China; Iceland; Israel; Japan; Liechtenstein; Moldavia; Montenegro; Norway; New Zealand; The Netherlands for Aruba; the United Kingdom; Singapore; Switzerland; Chinese Taipei; Ukraine.

third countries in question.[220] Then and above all, Chapter 4 of the regulation on foreign subsidies is dedicated to public procurement or concession proceedings. An obligation to give prior notice of foreign financial contributions or to declare them weighs on the third-country operators benefiting from foreign subsidies which intend to bid for public procurement or concessions (above some thresholds). Pursuant to Article 27 of the regulation, a foreign subsidy involving a competition distortion is considered as allowing a third-country operator to make an unduly advantageous offer for the work, supply or services in question. In such a case, the Commission adopts either a decision not to object, or a decision with commitments, or, when there are no commitments or they are neither appropriate nor enough to compensate for the distortion, a decision prohibiting that the procurement or the concession be awarded.

Access to the equivalence-dependent market. In order to re-establish the level playing field, a logic of equivalence is sometimes developed. While the notion of equivalence is well-known in Union law, it is rather its meaning in financial law that is used here. Indeed, the Union legislator has inserted provisions that allow third-country operators to access the internal market to offer a specific service or good in a few acts. Those provisions authorise the Commission to adopt an implementing act acknowledging that the legal framework and surveillance system of a third country ensures compliance by third-country operators with legally constraining requirements which are equivalent to the requirements provided for in Union law. For example, in accordance with Article 25(6) of Regulation (EU) N° 648/2012, the Commission has adopted a decision on the equivalence of the regulation framework of the United States for central counterparts which are approved and monitored by the Securities and Exchange Commission of the United States with the requirement of Regulation (EU) N° 648/2012.[221]

Isn't it also a logic of equivalence that is to be found in the carbon border adjustment mechanism (CBAM)? It is at least a split equivalence, being at the same time regulatory and financial. The CBAM regulation indeed completes the system of greenhouse gas emissions trading in the Union established in the context of Directive 2003/87/EC 'by applying an equivalent set of rules to imports into the customs territory of the Union of the goods referred to in Article 2 of this Regulation'.[222] In short, the aim is to require that the Union importers of some goods (cement, iron and steel, fertiliser etc.) buy carbon certificates corresponding to the price at which the carbon would have been bought if the goods had been produced in compliance with the Union rules in terms of carbon price scale. However, if a third-country producer establishes that he has already paid the price for the carbon used in the production of the goods imported into a third country, the corresponding price may be completely deducted for the Union importer. The idea is to reduce the risk of carbon leak

220. European Parliament and Council Regulation (EU) 2022/1031 of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2022], OJ L 173, 1.

221. Commission Implementing Decision (EU) 2022/551 of 4 April 2022 amending Implementing Decision (EU) 2021/85 on the equivalence to the requirements of Regulation (EU) N° 648/2012 of the European Parliament and of the Council of the regulatory framework of the United States of America for central counterparties that are authorised and supervised by the U.S. Securities and Exchange Commission [2022], OJ L 107, 82; European Parliament and Council Regulation (EU) N° 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012], OJ L 201, 1.

222. European Parliament and Council Regulation (EU) 2023/956 of 10 May 2023 establishing a carbon border adjustment mechanism [2023], OJ L 130, 52, Article 1(2).

and encourage third-country operators to resort to production processes that are more climate friendly. In so doing, as the Commission indicates, the CBAM contributes to restore fair competition conditions.[223]

As a discourse, doesn't the level playing field lead to justifying the preference given to a unilateral action of the Union rather than to the conclusion of international agreements? Indeed, the best way to guarantee fair competition conditions is to ensure the reciprocity that is inherent in the conclusion of international conventions. When it comes down to it, free-trade agreements have referred in their preamble to the fulfilment of fair competition conditions.[224] The Commission itself seems to acknowledge that the conventional path would be more adapted than unilateral action to promote an equivalence guaranteeing fair competition conditions. A revealing analysis has been made in a recital of a minor act in which the Commission has underlined that

> The ongoing review of the legal framework of the organic production sector has revealed shortcomings in the current scheme of recognition of third countries for the purpose of equivalence. Most of the equivalence arrangements signed by the Commission and third countries have been unilaterally applied by the European Commission which has not been conducive to the promotion of a level playing field. It was found that equivalence recognition with third countries should be established through international agreements. Therefore, the current scheme of recognition of third countries for the purpose of equivalence based on equivalence arrangements should shift to a scheme based on balanced international agreements with a view to promoting a level playing field, transparency and legal certainty.[225]

The return of the conventional path appears in a new technique called that of 'mirror clauses'. The idea was launched during the French presidency of the Council of the European Union in the first semester of 2022. President Emmanuel Macron thus stated that 'our trade policy must include mirror clauses on climate and biodiversity'.[226] The aim is to introduce into free-trade agreements clauses through which access to the internal market of goods, or even services, would be dependent on the third country's compliance with environmental social and other norms, equivalent to those consecrated in Union law. That has generated lively discussions even within the Union.

* * *

This analysis reveals that the level playing field is a living discourse in Union law, the occurrence of which increased at the beginning of the 2020s. It has two meanings. The first is internal to the European Union and can be considered as consubstantial with the objective of integration into the internal market. The latter supposes equality among economic operators in the market which must be promoted by the rules of the internal market. Then, legally speaking, the level playing field is redundant in that it is induced by existing rules. Politically speaking, it has an interest as, for us, it founds public action in a market economy, which is not classic interventionism, but more about adopting measures that will allow to

223. Commission, Carbon Border Adjustment Mechanism: Q&A, 14 July 2021.
224. Agreement between the European Economic Community and the Swiss Confederation of 22 July [1972], OJ L 300, 188.
225. Commission Implementing Regulation (EU) Nº 442/2014 of 30 April 2014 amending Regulation (EC) Nº 1235/2008 as regards requests for inclusion in the list of third countries recognised for the purpose of equivalence in relation to the import of organic products [2014], OJ L 130, 39, Rec. 3.
226. Statement of French President Emmanuel Macron on the preservation of biodiversity, forests and oceans, Marseille 3 September 2021.

correct market failures. The second meaning is external and allows to compensate for the limits of the Union's economic action on an international scale. Its meaning is much more political since the level playing field then founds an action of the Union which is not limited to opening the internal market to the rest of the world, but to guarantee that third countries' access happens in conditions that are fair for European companies. In doing so, the action thus conducted includes considerations which go far beyond the sole questioning of the optimal operation of the market. The aim is to diffuse the values of the European Union and Member States globally, in a renewed geopolitical context. The internal market then becomes more an instrument serving a political cause, and neo-idealism, which carries an ideal market economy, takes on a shade of neo-liberalism.

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CORPORATE ASSET LOCKS: A COMPARATIVE AND EUROPEAN PERSPECTIVE

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The global debate on corporate purpose and new corporate forms includes a recent legislative reform proposal in Germany focusing on steward ownership. The proposal is part of a wider comparative trend towards the creation of long-term, purpose-driven enterprises and forms of social entrepreneurship across Europe. Steward ownership promotes the use of profits for a chosen purpose and can therefore contribute to sustainable value creation. The legislative proposal includes a permanent asset lock to ensure that profits are reinvested in the company. Shareholders can be remunerated for their work, but they cannot receive dividends or claim more than their capital in the event of liquidation. The asset lock has raised questions about its compatibility with EU law. The article argues that the asset lock is a valuable innovation in European company law and can be designed to meet the requirements of EU law. While the article concludes that the asset lock does not contradict EU law, possible restrictions may be justified. Nevertheless, the draft could be improved during the legislative process by providing for a distinct legal form, including a mission statement, and by allowing cross-border conversions into corporate forms with a comparable asset lock.

Introduction

The purpose of the corporation and new forms of business are being debated around the world. As part of this global debate, the concept of steward-ownership and its implementation is the subject of a current reform proposal in Germany. The central element of the proposal is a permanent non-distribution restriction, ie a capital or asset lock. Shareholders can be remunerated for their work for the company. However, they may not receive any dividends and, in the event of liquidation, may only claim repayment of their contribution to the company's capital. This strict commitment, which under current law can only be

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achieved through complex, two-tier constructions, is intended to ensure that company profits are permanently used for the purpose of the company. Even though the proposal has not been adopted yet, the coalition agreement of the parties forming the current German government has promised to create such a new legal framework for steward-owned companies (*Unternehmen mit gebundenem Vermögen*).

The asset lock prohibits not only the distribution of dividends during the company's lifetime, but also the distribution of residual funds at the time of dissolution and transformation into or merger with another company not subject to the same restrictions. The latter rule against transformation into another company without an asset lock raises questions at the European level, in particular whether the asset lock is compatible with the freedom of establishment under primary law pursuant to Articles 49 and 54 TFEU and with the requirements of the Second Company Law Directive under European company law. For good reasons, the German legislator endeavours to draft laws in line with European law. It is therefore necessary to clarify whether such concerns are unfounded. However, a finding of non-compliance with European law would have implications far beyond the specific legislative proposal, as asset locks and non-distribution restrictions are widespread throughout Europe. Indeed, a comparative legal overview shows that the permanent non-distribution restriction or asset lock is not a novelty, but is remarkably widespread as a regulatory concept and – as a principle for social enterprises – even adopted by institutions of the European Union. At an even deeper level, this issue is linked to the most fundamental questions of trust and purpose in company law. The significance of the question therefore goes far beyond the German project of a new corporate form for steward-ownership, but touches on many European corporate forms designed for social entrepreneurship.

Part I of this paper examines the current trend towards new corporate forms in Europe and beyond, and the importance of non-distribution restrictions. It also introduces the German concept of steward-ownership with its characteristic asset lock. Part II examines the compatibility of the asset lock with European primary law. Part III then turns briefly to European secondary law. We argue that the asset lock is an important feature of legal innovation in Europe. When properly examined, the asset lock turns out to be compatible with the EU requirements of the fundamental freedoms and, in principle, also with the directives. In any event, it is possible to design a company with an irrevocable asset lock in a way that complies with European law, even if the legislator has to respect certain limits.

I. Asset locks and Non-distribution Constraints in Europe and Germany

1. New Corporate Forms and Non-distribution Constraints

In recent decades, there has been a growing debate about the purpose of the firm and the corporation, their design and their role in society.[2] Doubts about maximising shareholder value and the search for a more equitable, sustainable and long-term-oriented economy are at the heart of the debate and the ensuing legislative efforts. An integral part of this devel-

2. See only C. Mayer, *Prosperity* (OUP 2018); A. Edmans, *Grow the Pie: How great companies deliver both purpose and profit* (CUP 2020); J.E. Fish and S. Davidoff Salomon, 'Should Corporations Have a Purpose?' (2021) 99 Texas Law Review 1309.

opment is the rise of social entrepreneurship, which combines business methods with socially beneficial goals, blurring the formerly strict boundaries between the business and non-profit sectors.[3]

National legislators have taken different approaches to the social enterprise debate and other movements to transform business and company law.[4] Some legal systems have introduced modifications to the traditional company form, such as the US benefit corporation and the UK community interest company. There are also various forms of associations and cooperatives, particularly in Europe. In addition, certain legal systems provide special rules or qualifications that can be adopted by different legal entities, regardless of their legal form. Especially in the Nordic countries, (enterprise) foundations are used for long-term, purposeful entrepreneurship, including social entrepreneurship.[5]

Cutting across these different organisational approaches, three issues can be identified that legislators address in different ways when introducing innovative company forms and regimes:

(1) The choice of a company's purpose, which is often required to be for the benefit of society or the environment rather than to maximise shareholder value.
(2) Governance, including member or shareholder participation, directors' duties, reporting and public oversight.
(3) Financial structures, often including non-distribution restrictions and asset locks, possibly even restrictions on the distribution of assets in the event of liquidation and the possibility of transformation into another legal form.[6]

Firstly, the requirement for a beneficial purpose other than maximising shareholder value, is at the heart of many new legal forms and regimes around the world, particularly in countries where it is believed that a company's purpose is legally limited to maximising shareholder value, as in the US (1).[7] Specific rules on governance (2) are found in all legal systems and are designed to ensure accountability. As will be shown below, regulations on financial structures (3) are of particular importance in Europe. Reform efforts to promote social entrepreneurship through the introduction of special legal regimes for different forms of enterprise are now enshrined in law in 21 of the 27 Member States.[8] The promotion of

3. H. Peter, C. Vargas Vasserot and J. Alcalde Silva (eds), *The International Handbook of Social Enterprise Law* (Springer 2023); J. Defourney and M. Nyssens (eds), *Social Enterprise in Central and Eastern Europe* (Routledge 2021); Defourney and Nyssens (eds), *Social Enterprise in Western Europe* (Routledge 2021). See also D. Brakman Reiser and S.A. Dean, *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (OUP 2017).
4. A. Fici, 'Models and Trends of Social Enterprise Regulation in the European Union' in H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva (eds) *The International Handbook of Social Enterprise Law* (Springer 2023), 153, 159-68.
5. S. Thomsen, 'Foundation Ownership around the world' in A. Sanders and S. Thomsen (eds), *Enterprise Foundation Law in Comparative Perspective* (Intesentia 2023) 7, 11-13; M. Gawell, *Social Enterprises and their Ecosystems in Europe – Country Report Sweden* (European Commission 2019) 30; L.U. Kobo, *Social Enterprises and their Ecosystems in Europe – Country Report Norway* (European Commission 2019) 24.
6. See also A. Argyrou and T. Lambooy, 'An Introduction to Tailor-Made Legislation for Social Enterprises in the EU: A Comparison of Legal Regimes in Belgium, Greece and the UK' (2020) 25 University of Oslo Faculty of Law Legal Studies Research Paper Series.
7. This is not to deny that powerful arguments have been broad forward against that position, see for example L. Stout, *The Shareholder Value Myth* (Berrett-Koehler 2012). See for a comparative discussion F. Möslein and A.-C. Mittwoch, 'Soziales Unternehmertum im US-amerikanischen Gesellschaftsrecht: Benefit Corporation und Certified B Corporations' (2016) 80 Rabels Zeitschrift für ausländisches und internationales Privatrecht 399.
8. For a comparative overview, see Fici (n 4). See also the country reports of Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).

social entrepreneurship is on the legal policy agenda of numerous European initiatives.[9] The definition of a social enterprise adopted by the European Commission in its 2011 Social Business Initiative states that a social enterprise 'has as its main objective to have a social impact rather than to make a profit' and 'uses its profits primarily to achieve a social mission'. In its latest Action Plan for the Social Economy of 9 December 2021, the European Commission defines social enterprises as businesses whose profits are 'largely reinvested' to achieve their business objectives.[10] It is therefore likely that permanent restrictions on profit distribution will not only be in line with the law of many Member States, but will develop into a kind of (common) European principle of social enterprise law.

The regulations on financial structures are based on the traditional non-distribution restrictions of non-profit organisations[11] that act 'selflessly', eg within the meaning of § 55 (1) of the German Fiscal Code (*Abgabgenordnung, AO*). The term 'non-profit organisation' blurs this typological distinction, as it is partly understood (only) in the former sense of non-distribution of profits, but partly only refers to the narrower field of non-profit organisations.[12] The new legal forms, in contrast, aim to reconcile entrepreneurial activity with the pursuit of social objectives: while in such hybrid forms the generation of profits at the level of the company is permissible and entirely desirable, the restriction on the distribution of profits to shareholders is intended to flank the social purpose by excluding the possibility of using such company forms exclusively as an instrument for maximising the profits of shareholders.[13]

a) New Corporate Forms

aa) Benefit Corporation

The benefit corporation is probably the best known example of a new legal form that is tailored to an understanding of business that rejects pure profit orientation. The benefit corporation model has been adopted in several jurisdictions,[14] for example in Italy. The benefit corporation was first introduced in Maryland in 2010 and is now available in 36 states, including Delaware and the District of Columbia, as well as Puerto Rico. In most states, the law is based on model legislation developed by attorney William H. Clark for his client B Lab Company, a nonprofit that initiated both B Corp certification and the benefit

9. European Commission, 'Social Entrepreneurship Initiative, Communication to Parliament, Council, Economic and Social Committee and Committee of the Regions' COM (2011) 682 final, art. 2; comparable definitions can be found in Art. 3(d) of the EuSEF Regulation, as well as in Art. 2(1) of Regulation (EU) 1296/2013 establishing a European Union Programme for Employment and Social Innovation (EaSI) [2013] OJ L 347/238.
10. European Commission, 'Building an Economy of Service: An Action Plan for the Social Economy, Communication to the Parliament, the Council, the Economic and Social Committee and the Committee of the Regions' COM (2021) 778 final, 4.
11. H. Hansmann, 'The Role of Nonprofit Enterprises' (1980) 89 Yale Law Journal 835: 'A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.'
12. For more details, see T. von Hippel, *Grundprobleme von Nonprofit-Organisationen* (Mohr Siebeck 2007) 14-47.
13. F. Möslein, *Reformperspektiven im Recht sozialen Unternehmertums* (2017) 50 Zeitschrift für Rechtspolitik 175, 177; Möslein and Mittwoch (n 7).
14. See the contributions in part III of Peter, Vargas Vasserot and Silva (n 3); Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).

corporation as a special legal form.[15] In addition to incorporating as a benefit corporation, businesses can demonstrate their commitment to responsible and sustainable entrepreneurship and seek certification from B Lab.[16]

All of the different benefit corporation regimes require a benefit corporation to have at least one social or environmental purpose, as described in question (1) above. Different regimes in different countries list different possible purposes. The Model Legislation requires a benefit corporation to have a purpose of 'creating public benefit'[17] which is defined as a 'material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations'.[18]

The model legislation sets out duties and procedures to underpin and enforce the company's commitment to its chosen public benefit, addressing point (2) above. There are corresponding duties on directors to balance the pursuit of purpose and profit, and reporting duties to publish an annual benefit report. In addition, the Model Law requires a benefit corporation to have a benefit director, an independent person[19] who should provide an opinion as to whether the corporation and its directors have acted in accordance with its purpose.[20]

However, the lack of an effective enforcement mechanism for beneficial purposes is criticized as an obstacle to the development of public trust.[21] For example, the right to sue for breach of the public benefit obligation is limited to shareholders and the company itself. This is seen as inefficient, as shareholders and the board are unlikely to demand that a public purpose be pursued at the expense of profits.[22] Although it is a legal requirement, in most states only 8-14% file their report.[23]

In addition, the commitment to the public purpose of a benefit corporation can always be abandoned later,[24] which is often the case as companies scale up, as Emilie Aguirre has shown, using the case of Etsy as an example.[25] She suggested the formation of a diverse

15. See for a comparative perspective only H. Fleischer, 'Die US-amerikanische Benefit Corporation als Referenz– und Vorzeigemodell im Recht der Sozialunternehmen' (2023) AG 1, 2; Möslein and Mittwoch (n 7); S.J. Shackelford, J. Hiller and X. Ma, 'Unpacking the Rise of the Benefit Corporation: A Transatlantic Comparative Case Study' (2020) 60 Virginia Journal of International Law 697; for the US American perspective see only M.J. Loewenstein, 'Benefit Corporation Law' (2017) 85 University of Cincinnati Law Review 381; J. Haskell Murray, 'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law' (2014) 4 Harvard Business Law Review 345; D. Brakman Reiser and S.A. Dean, 'Financing the Benefit Corporation' (2017) 40 Seattle University Law Review 793.
16. <https://www.bcorporation.net/en-us/> accessed 1 February 2023.
17. Model Benefit Corporation Legislation, section 201(a).
18. Model Benefit Corporation Legislation, section 102.
19. As defined in Model Benefit Corporation Legislation, section 102.
20. Model Benefit Corporation Legislation, section 302.
21. J. Haskell Murray (n 15); Z. Needle, 'Who Will Watch the Watchers?: Enacting a Corporate Observing Board to Increase Consideration of Stakeholder Interests' (2020) 89 Fordham Law Review 763; E. Aguirre, 'Beyond Profit' (2021) 54 University California Davis Law Review 2077-148, 2087-98.
22. M. Verheyden, 'Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations' (2011) 14 Hastings Business Law Journal 56; D. Brakman Reiser, 'Benefit Corporation – A sustainable form of organization?' (2011) 46 Wake Forest Law Review 613.
23. J. Haskell Murray, 'An Early Report on Benefit Reports' (2015) 118 West Virginia Law Review 50 and 52 (Table A: Benefit Reporting Data); Verheyden (n 22) 104 Appendix II-V.
24. See Model Legislation § 105(a) according to which a vote with a 2/3 majority is required; Cal. Corp. Code §§ 14604(a); NJ Rev Stat §§ 14A:18-4; MD Corp & Assn Code § 5-6C-04. See also Katz/Page, 'Sustainable Business' (2013) 4 Emory Law Journal 851, 865ff; F. Möslein and A.-C. Mittwoch, 'Welche Rechtsform für verantwortliches Unternehmertum?' (*Frankfurter Allgemeine Einspruch*, 8 Dec 2020); B. Momberger, *Social Entrepreneurship – im Spannungsfeld zwischen Gesellschafts– und Gemeinnützigkeitsrecht* (Bucerius Law School Press 2015) 250ff.
25. Aguirre (n 21) 2077-148, 2079-80, 2087-98.

board with worker representation and socially conscious executive compensation as tools to achieve long-term commitment to public purpose.[26] So far, however, Connecticut is the only state that has introduced a so-called ‘preservation clause’ that prevents a benefit corporation from being converted into a regular corporation.[27]

In summary, the benefit corporation combines rules for purpose selection (1) with certain, albeit limited, governance tools, but lacks (2) restrictions on profit distribution and (3) transformation. The benefit corporation is designed to combine the pursuit of profit with the pursuit of a good purpose. This characteristic combination of profit and ‘good’ purpose raises the challenge of how to ensure that purpose is not abandoned in the interest of profit. Liptrap argued (with reference to the UK Community Interest Company) that this ‘legacy problem’[28] is the natural consequence of combining two different logics, the logic of acting for the public good and the logic of profit, in one legal form. The benefit corporation does not solve this problem, but leaves it to the discretion of shareholders and management.

bb) Other European Corporate Forms

In the UK (Community Interest Company, CIC) and Belgium (*Vennootschap meet Sociaal Og-merk, VSO*),[29] special forms of company law have been developed for social enterprises. They require the pursuit of a social purpose (1) and impose certain governance instruments, including reporting requirements and supervision (2). However, they all impose significant restrictions on the distribution of profits (3).

The UK community interest company,[30] introduced by the Companies (Audit, Investigations and Community Enterprise) Act 2004,[31] can only distribute 35% of its profits. It cannot change its form. In the event of liquidation, shareholders can only claim back their initial investment, while any remaining profits must be given to another social enterprise.[32] It is important to note, however, that many community interest companies do not distribute any profits at all. According to the UK 2021 Social Enterprise Survey, most social enterprises in the UK are registered as either companies limited by guarantee (28%) or community interest companies limited by guarantee (21%). Only 8% are clearly community interest companies limited by shares.[33] Companies limited by guarantee are used not only in the UK but also in Ireland.[34] Companies limited by guarantee are usually set up for charitable purposes. Such a company has no shareholders, but members who are only potentially liable for the amount they have ‘guaranteed’ to pay, usually £1. Profits are not usually distributable, but must be ploughed back into the company itself for such purposes as are

26. ibid 2077-48, 2079-80, 2116-30; G.M. Hayden and M.T. Boodie, *Reconstructing the Corporation* (CUP 2020) 161ff.also suggest including employees on the corporate board.
27. B. Morgan, ‘Transcending the Corporation’ in T. Clarke, J. O´Brien, C.R.T. O´Kelley (eds), *The Oxford Handbook of the Corporation* (OUP 2019) 667-686; <https://ctnewsjunkie.com/2014/10/01/social_entrepreneurs_celebrate_new_corporate_structure/> accessed 1 February 2023).
28. J.S. Liptrap, ‘The Social Enterprise Company in Europe: Policy and Theory’ (2020) 20 Journal of Corporate Law Studies 495, 519ff.
29. Argyrou and Lambooy (n 6). The VOS was discontinued in 2019.
30. J.S. Liptrap, ‘British Social enterprise law’ (2021) 21 J. Corp. Law Stud. 595; N. Boeger, S. Burgess and J. Ellison, ‘Lessons from the Community Interest Company’ in N. Boeger and C. Villiers (eds), *Shaping Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing 2018) 347-64; Momberger (n 24) 242ff.
31. <https://www.legislation.gov.uk/ukpga/2004/27/contents> accessed 1 February 2023.
32. CiC Regulation 2005, ref. 23.
33. Social Enterprise UK, Not Going Back – State of Social Enterprise Survey (2021) 12.
34. M. O’Shaugnessy, *Social Enterprises and their Ecosystems in Europe – Country Report Ireland* (European Commission 2020) 26-27; F. Lyon, B. Stumbitz and I. Vickers, *Social Enterprises and their Ecosystems in Europe – Country Report United Kingdom* (European Commission 2019) 23-28.

specified in its constitutional document.[35] For this reason, the company limited by guarantee is sometimes referred to on the internet as a 'foundation company'.[36] However, companies limited by guarantee do not have an asset lock per se, but usually provide for one in their articles of association.

The Latvian legislator has created a special status, not a special form of company, which will therefore be discussed below. However, only limited liability companies can obtain this status.[37] Under this status, the distribution of profits is completely prohibited in Latvia; profits must be reinvested or used to achieve the social purpose.[38] In case of liquidation and transformation, according to Article 11, it seems to lose its social enterprise status; the status can only be kept in case of a merger with another social enterprise. The Belgian VOS limits the profits to be distributed to a certain official rate of return on the investment; in 2015 this was 6%.[39] In the event of liquidation, any surplus remaining after payment of debts had to be used for social purposes close to those of the VOS.

Thus, these company law forms not only contain rules on purpose (1) and governance (2), but also impose strict limits on the distribution of profits during the life of the company and on liquidation in category (3). The community interest company also explicitly blocks transformation; Belgian law is less clear in this respect.

A very interesting, albeit rare,[40] form is the Swedish *aktiebolag med vinstutdelningsbegränsning* (limited liability company with restricted distribution of profits), which was introduced by a law in 2005 and came into force in 2006 and is regulated in Chapter 32 of the *aktiebolagslagen* (Companies Act).[41] An *aktiebolag med vinstutdelningsbegränsning* must indicate its legal form by adding the letters svb to its name (§§ 17, 18). The law does not require that a charitable purpose be pursued (point a), but it does require special management (b) and a strict asset lock (c). The company form was intended for activities that were previously carried out under public auspices, for example in the health sector.[42] The rules are designed to ensure that the majority of the company's profits remain within the company.[43]

The distribution of profits is limited to a low, fixed rate of interest (§ 5). The company must have at least one auditor, who must check the annual report on the financial situation, including loans (§§ 3, 4). The asset lock is irreversible (§ 15) and also prohibits transformation (§§ 11-12a). A merger or division of such a company is only possible if the acquiring company is of the same type. With a new law that came into force on 31 January 2023, the Swedish legislator has excluded cross-border transformations of this limited liability company (§ 12a), which are regulated for other limited liability companies in Chapter 34a of the Companies Act.

35. O'Shaughnessy (n 34) 26-27.
36. <https://www.easy-limited.de/infothek/stiftungs-limited-company-limited-by-guarantee> accessed 1 February 2023 – 'Stiftungs GmbH'.
37. Fici (n 4). 169, 166. 160, 166.
38. Fici (n 4). 160, 166.
39. Y. Sebbarh, *The Belgian Social Purpose Company: Maintain, Adjust or Abandon?* LLM Thesis (Catholic University of Leuven 2017) 65 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://6emesconf.exordo.com/files/papers/56/final_draft/YounesSebbarh-Thesis-Arial.pdf>.
40. According to the Swedish registration office, there are roughly 190. See also Gawell (n 5) 30.
41. For the governmental proposal see Regeringens proposition 2004/05:178, for the law see <https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/aktiebolagslag-2005551_sfs-2005-551#K32> accessed 1 February 2023.
42. Pestoff, *A Democratic Architecture for the Welfare State* (Routledge 2009); Gawell (n 5) 22-23.
43. Information of the Swedish Companies Registration Office <https://bolagsverket.se/foretag/aktiebolag/startaaktiebolag/aktiebolagmedvinstutdelningsbegransning.531.html> accessed 1 February 2023.

The law also contains rules on the preservation of assets in the event of liquidation (§ 13). Any surplus remaining, after the debts have been paid and the shareholders have been repaid their investment in their shares, must be paid to another limited liability company or companies with a special profit distribution restriction specified in the articles of association. If the articles of association do not provide for such a recipient, the assets go to the general inheritance fund (§ 14).

In summary, the Swedish *aktiebolag med vinstutdelningsbegränsning* combines a broad approach to the purpose of the company (1) with a strict asset lock, even excluding cross-border conversions (3), and governance that preserves the asset lock (2).

b) Cooperatives and Associations

The company law form has lost importance for social enterprises in the EU: the UK is no longer a member of the EU, and the VOS was abolished in 2019, when Belgian company law and the law on associations were reformed and simplified.[44] In Belgium, it is now possible for associations and cooperatives to use the legal forms of the association *sans but lucratif* or cooperative accredited as social enterprise. Such associations are allowed to carry out commercial activities. The only difference between an association and a company is now the absolute prohibition to distribute dividends or to grant advantages to its members or directors.[45] Thus, the asset lock of the association seems to be even stricter than that of the VOS. On the European level, the draft proposal for a European cross border association of September 5th 2023 (2023/0315) must be mentioned. The draft does not forbid the association to make profits but includes a full asset lock.

The cooperative movement has been described as the origin of social entrepreneurship in Europe.[46] Fici describes it as the 'ideal model' and the most common legal form for a social enterprise, with regulations in Croatia, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal and Spain.[47] The traditional cooperative purpose of supporting its members has been opened up to more social objectives. Today, the social cooperative combines specific participatory, ie democratic governance rules (2), with the requirement to pursue charitable purposes (1) and, in most cases, financial rules limiting or prohibiting the distribution of profits (3).[48] An example is the Greek social cooperative (koinsep): 60% of its profits must be reinvested, 5% allocated to the reserve, and 35% paid out as productivity bonuses to employees. After liquidation, the remaining funds must be transferred to the Social Economy Fund.[49]

c) Labels

Rather than creating tailor-made special legal forms, many legislators across Europe are developing legal frameworks or certificates that can be adopted by different corporate forms

44. M. Nyssens and B. Huybrechts, 'Social Enterprises in their Ecosystems in Europe' in *Country Report Belgium* (European Commission 2020) 41.
45. <https://www.eylaw.be/2019/02/28/approval-of-the-new-belgian-code-on-companies-and-associations/> accessed 1 February 2023.
46. D Hernández Cácaerez, 'Social Enterprises in Social Cooperative Form' in H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva, *The International Handbook of Social Enterprise Law* (Springer 2023) 173.
47. Fici (n 4) 160.
48. Hernández Cácaerez (n 46). Table 3, 183.
49. Argyrou and Lambooy (n 6) 95-97; Hernández Cácaerez (n 46) Table 3, 183.

to achieve the status of a socially responsible enterprise or social enterprise.[50] Examples can be found in Bulgaria, Cyprus, Denmark, Finland, France, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia and Spain.[51]

The French *société à mission* was introduced in 2019 and follows a different approach, outside the field of social entrepreneurship.[52] Like the other examples in this section, it is not a specific legal form but is open to all companies that want to commit themselves to a *raison d'être,* a purpose that must include at least one social or environmental objective. If this approach is chosen, the company must earmark funds to pursue this purpose, and it must establish a special body within the company to oversee the fulfilment of the mission. At least one member of this body must be an employee. The *société à mission* thus combines rules on the corporate purpose (1) with governance tools that can be described as more robust than those of the benefit corporation (2). However, it has no restrictions on profit distribution or transformations (3).

For social enterprises, such labels ensure that the social enterprise identity is maintained across different legal forms.[53] Achieving the desired status requires a commitment to a purpose that benefits the public (1), and requires governance tools including reporting and public oversight (2).[54] In addition, legislation often limits the profits that can be distributed to shareholders and members during and after the life cycle of the social enterprise (3). Given the definitions at the European level already mentioned, such asset locks are seen as a crucial feature of social enterprises in Europe.[55] Such rules are important not only during the operation of a social enterprise, but also in the event of liquidation, transformation or, in this case, de-registration. In the absence of such rules, shareholders or members could simply leave the scheme, become a for-profit company again and take possession of the assets acquired during the time as a social enterprise, thereby rendering the asset lock at registration essentially meaningless, thereby disappointing the trust of various stakeholders.[56]

An example is the Danish *registrerede socialøkonomiske virksomheder*,[57] which can only distribute 35% of its profits during its lifetime and in the event of liquidation.[58] In France,

50. On these two regulatory approaches, see, for example, A. Fici, 'Recognition and Legal Forms of Social Enterprise' (2016) 27 European Business Law Review 639, 662-67; K. Engsig Sørensen and M. Neville, 'Social Enterprises: How should company law balance Flexibility and Credibility?' (2014) 15 European Business Organization Law Review 267, 279-85; Möslein (n 13) 175, 177.
51. For a comparative law overview, see Fici (n 4) 153, 165 See also the country reports in: Defourney and Nyssens, *Central Europe* and *Western Europe* (n 3).
52. B. Segrestin, A. Hatchuel and K. Levillain, 'When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose' (2021) 171 Journal of Business Ethics 1-13 <https://doi.org/10.1007/s10551-020-04439-y>; I.M. Barsan and M. Hertslet, 'Unternehmensinteresse, Gesellschaftszweck und Corporate Social Responsibility – Neuere Entwicklungen im französischen Gesellschaftsrecht' (2019) 4 Zeitschrift für Internationales Wirtschaftsrecht 256.
53. Fici (n 4). 153, 165-66.
54. In case of Poland, eg the wojewoda, local government agents (Article 10-20) and an advisory body with employees (Article 7), see Ustawa, z dnia 5 sierpnia 2022 r.o ekonomii społecznej (Act on the social economy) Art. 10-13 <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001812/T/D20221812L.pdf> accessed 1 February 2023.
55. C. Bolzaga and others, *Social Enterprises in their Ecosystems in Europe, Comparative Synthesis Report* (European Commission 2020) 31, 160-61: definition.
56. Sørensen and Neville (n 50) 303-04.
57. See for the law in Danish <https://www.retsinformation.dk/eli/lta/2014/711> accessed 1 February 2023. See also Sørensen and Neville (n 50) 298-303; J.S. Liptrap 'A More Socio-Environmentally Responsive Way to Organise the Firm? A Case Study on Danish Social Entrprise Law' 19 European Company and Financial Law Review, 2022. 517.
58. See for the 'protective mechanisms' under Danish law JLiptrap (n 57).

under the regime of the *entreprise solidaire d'utilité sociale* (ESS),[59] most profits must be used for its purpose and mandatory reserves must be created. Such reserves must not be distributed but 50% may be incorporated to increase shares or distribute bonus shares. In case of transformation or liquidation, the property and capital must be transferred to another social enterprise. Like a company under the French ESS-regime, the Luxembourg *société d'impact sociétal*[60] may distribute up to 50% of its profits and must transfer its assets to a social enterprise with a similar purpose in the event of a merger or liquidation. However, if it has only non-performing shares, no dividends are paid. The Romanian *întreprinderil sociale*[61] may distribute only 10% of profits. In the event of liquidation and deregistration, the French,[62] Luxembourg[63] and Romanian[64] schemes require the assets to be transferred to another social enterprise. In Slovenia[65] and Poland,[66] no distribution of profits is allowed at all, bringing the asset lock to 100%.

In the case of conversion or liquidation, there appear to be many provisions to ensure that the asset lock is maintained, particularly in that the assets in question can only be transferred to other organisations with the same or similar objectives.

d) Foundations

Foundations, including enterprise foundations, have a long tradition, especially in the Nordic countries, as a legal form for long-term businesses in general. If a foundation runs an enterprise or, more often, holds shares in a company that runs an enterprise, it can be called an enterprise foundation.[67] A foundation has no shareholders or members, it exits only to fulfil the purpose set out by its founder. Its governance depends on the legal system, but it is usually supervised by a public authority. The purpose of a foundation is usually set in perpetuity, and its implementation is usually more or less supervised by a special public body. As a foundation has neither shareholders nor members, it cannot distribute profits to them, thereby securing a complete asset lock. Transformations into another form are not considered possible.[68] Thus, enterprise foundations fulfil all the elements of a fixed purpose (1), governance (2), and asset lock (3).

59. Loi 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029313296/> accessed 1 February 2023; Liptrap (n 28) 495-96.
60. Loi du 12 décembre 2016 portant creation des sociétés d'impact sociétal <https://data.legilux.public.lu/file/eli-etat-leg-loi-2016-12-12-n1-jo-fr-html.html> accessed 1 February 2023; Yeo, 'New type of Company on the block' (2017) KPMG Luxembourg <https://www.mondaq.com/corporate-and-company-law/565984/new-type-of-company-on-the-block-socit-d39impact-socital> accessed 1 February 2023.
61. Lege No. 219 din 23 iulie 2015 privind economia socială <http://legislatie.just.ro/Public/DetaliiDocument/170086> accessed 1 February 2023.
62. Loi 2014-856 du 31 juillet 2014 relative à l'économie sociale et solidaire, Article 1 Nr. 3 b).
63. Loi du 12 décembre 2016 portant creation des sociétés d'impact sociétal (n 60), Article 11 (2).
64. Lege No. 219 din 23 iulie 2015 privind economia socială (n 61) Article 8 (4) (c).
65. C. Vargas. Vasserot, 'Legal Regulation of Social Enterprises in other European Countries' in (H. Peter, C. Vargas Vasserot & Jaime Alcalde Silva *The International Handbook of Social Enterprise Law* (Springer 2023) 942-43.
66. See Ustawa, z dnia 5 sierpnia 2022 r.o ekonomii społecznej (Act on the social economy) Art. 9 <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20220001812/T/D20221812L.pdf> accessed 1 February 2023.
67. Thomsen (n 5) 7, 11-13. See also S. Thomsen, *The Danish Industrial Foundation* (DJOF Publishing 2017).
68. See with comparative overview A. Sanders and S. Thomsen, 'Enterprise Foundation Law in a Comparative Perspective: Concluding Observations' in *Enterprise Foundation Law in Comparative Perspective* (Intersentia 2023) 221-45.

e) Comparative Summary

This comparative survey has shown that not only purpose orientation and governance rules, but also asset locks, non-distribution restrictions, and rules on transformation are common in different legal forms and regimes for purpose-oriented businesses, especially social entrepreneurship. As required by European definitions of social enterprises, such rules ensure that profits are used to pursue the chosen purpose and are not distributed to shareholders and members. Rules on liquidation and transformation ensure that this treatment of profits cannot be abandoned at the time of liquidation or transformation.

2. The Concept of Steward-Ownership

Germany does not yet have a specific legal regime for social enterprises, although existing company, foundation and cooperative law is often used for this purpose. Steward-ownership is a concept that goes beyond social entrepreneurship, although the legal regime it advocates could be used by social enterprises and other businesses. It combines a strict asset lock with an open approach to purpose. Governance rules are also seen as an important element for ensuring that the asset lock is respected. However, these rules are not the focus of the present discussion.

The concept of steward-ownership –[69] *Verantwortungseigentum*, *Unternehmen mit gebundenem Vermögen* or *treuhänderisches Unternehmertum* in German –[70] was developed by a group of entrepreneurs who have joined forces in the *Stiftung Verantwortungseigentum e.V.*[71] The coalition agreement between the Social Democratic Party (*SPD*), the Green Party (*Bündnis 90/Die Grünen*) and the Liberal Party (*FDP*) of 24 November 2021 provides for the creation of a new, suitable legal basis for steward-ownership.[72] A group of academics, including the authors of this article, has drawn up a much-discussed draft law to provide the legislators with food for thought.[73]

69. A. Sanders, 'Binding Capital to Free Purpose', 19 European Company and Financial Law Review, 2022, 662; A. Sanders, 'Vermögensbindung und "Verantwortungseigentum" im Entwurf einer GmbH mit gebundenem Vermögen' (2021) 24 Neue Zeitschrift für Gesellschaftsrecht 1573.
70. In German, *Verantwortungseigentum* means 'responsibility ownership'. This term was supposed to underline the responsibility steward-owners bear for the businesses in question even though they do not own the business financially. However, since this term can be misunderstood as claiming that responsible business ownership was only possible in this form, it is not used in the draft law anymore.
71. <www.stiftung-verantwortungseigentum.de>; for English information <www.purpose-economy.org>.
72. See Coalition Agreement 2021-2025 between SPD, Bündnis 90/Die Grünen, and FDP, p. 30, <https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1> accessed 1 February 2023.
73. A. Arnold and others, 'Die GmbH im Verantwortungseigentum – eine Kritik' (2020) 23 NZG 1321; A. Arnold and others, 'Stellungnahme zum Vorschlag einer GmbH "in Verantwortungseigentum"' (2020) 18 Zeitschrift für Stiftungs– und Vereinswesen 201; H.-J. Fischer and K. Fischer, 'Die GmbH in Verantwortungseigentum (VE-GmbH) im Rahmen der Umsetzung globaler Nachhaltigkeitsziele – eine mögliche neue Rechtsform für den Mittelstand' (2022) 75 Betriebs-Berater 2122; B. Grunewald and J. Hennrichs, 'Die GmbH in Verantwortungseigentum, wäre das ein Fortschritt?' (2020) 23 NZG 1201; M. Habersack, '"Gesellschaft mit beschränkter Haftung in Verantwortungseigentum" – ein Fremdkörper im Recht der Körperschaften' (2020) 111 GmbH-Rundschau 992; O. von Homeyer and M. Reiff, 'Verantwortungseigentum ante portas? – Erste Betrachtungen einer weitreichenden Idee' (2020) 12 Zeitschrift für das Recht der Non Profit Organisationen 224; R. Hüttemann, P. Rawert and B. Weitemeyer, 'Zauberwort "Verantwortungseigentum"' (*Frankfurter Allgemeine Zeitung*, 6 Nov 2002); M. Reiff, 'Entwurf eines Gesetzes für die GmbH in Verantwortungseigentum (VE-GmbH) vorgelegt' (2020) 41 Zeitschrift Wirtschaftsrecht 1750; J. Vetter and T. Lauterbach, 'Bedarf es gesetzlicher Regelungen für Gesellschaften in Verantwortungseigentum?' in B. Dauner-Lieb and others (eds) *Festschrift für Grunewald* (Otto Schmidt ➤

Entrepreneurs who follow this concept see themselves as stewards of their voting rights for the next generation.[74] Profits which shareholders usually receive through dividends or on liquidation should remain in the company to be reinvested or donated. In this way, profits serve the objectives of long-term entrepreneurship and the purpose of the company.[75] Steward-owned businesses should not be sold for profit but remain independent.

a) Asset Lock

The core of the concept is the permanent asset lock: shareholders contribute to the capital of the company and can be remunerated for their work for the company. Shareholders do not receive any dividends and, in the event of liquidation, can only claim repayment of their contribution to the company's capital. However, unlike the UK community interest company and the Swedish *aktiebolag med vinstutdelningsbegränsning*, there are no restrictions on interest payments and bonuses to employees, other than that the company may not pay more than the normal market rate.

2021) 1199; B. Weitemeyer, 'Unternehmen in Verantwortungseigentum? Zur Zulässigkeit der Selbstbeschränkung und Unveräußerlichkeit im Stiftungs– und Gesellschaftsrecht' in S. Grundmann, H. Merkt and P. Mülbert (eds) *Festschrift für Hopt* (De Gruyter 2020) 1419; B. Lomfeld and N. Neitzel, 'Verantwortungseigentum! Der Gesetzesentwurf zur GmbH mit gebundenem Vermögen' (*Verfassungsblog*, 13 March 2021) <https://verfassungsblog.de/verantwortungseigentum/>; U. Burgard, 'Verantwortungseigentum in Stiftungsform de lege lata und de lege ferenda' (2021) 19 ZStV 1; Sanders (n 69) 1573; W. Servatius, 'Verantwortungseigentum – in dubio Gesellschaftsrecht!' (2021) 24 NZG 569; L. Strohn, 'Schutz der Menschenrechte durch das Sorgfaltspflichtengesetz' (2021) 185 Zeitschrift für das Gesamte Handels– und Wirtschaftsrecht 629; B. Weitemeyer, B.E. Weißenberger and G.T. Wiese, 'Eine GmbH mit ewigem Gewinnausschüttungsverbot, Bahnbrechende Innovation oder volkswirtschaftlich bedenkliche Perpetuierung?' (2021) 112 GmbHR 1069; G. Rabea Rolfes and S. Berisha, 'Der Schutz der Gläubiger des Gesellschafters einer GmbH mit gebundenem Vermögen' (2022) 113 GmbHR 23; H. Fleischer, 'Ein Schönheitswettbewerb für eine neue Gesellschaftsform mit Nachhaltigkeitsbezug: Zur rechtspolitischen Diskussion um eine GmbH mit gebundenem Vermögen' (2022) 43 ZIP 345; A. Engel and D. Haubner, 'Die GmbH mit gebundenem Vermögen und das Europarecht' (2022) 60 Deutsches Steuerrecht 844; J.-E. Schirmer, 'Nachhaltigkeit via Gesellschaftsform: Europäische Lektionen für die GmbH mit gebundenem Vermögen' 31 Zeitschrift für Europäisches Privatrecht (15 Dec 2022) (unpublished manuscript <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4289719> accessed 1 February 2023). On tax law: S. Kempny, 'Die "GmbH mit gebundenem Vermögen" ist kein "Steuersparmodell"– Terminologische und ertragsteuersystematische Bemerkungen – Zugleich Erwiderung auf Hüttemann/Schön' (2021) 25 Der Betrieb 1356 & 39 DB 2248; S. Kempny, 'Steuerrechtliche Gesichtspunkte im Entwurf einer GmbH mit gebundenem Vermögen' (2021) 74 DB 25; R. Hüttemann and W. Schön, Die '"GmbH mit gebundenem Vermögen" – ein Steuersparmodell?!' (2021) 74 DB 1356; C. Watrin and F. Riegler, '"Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen" – Würdigung der vorgeschlagenen Anpassungen des KStG und des ErbStG' (2021) 103 FR 350; a current bibliography can be found here Literatur – Universität Bielefeld (uni-bielefeld.de) <https://www.uni-bielefeld.de/fakultaeten/rechtswissenschaft/ls/sanders/verantwortungseigentum/literatur-1/> accessed 1 February 2023.

74. 'Was heißt Verantwortungseigentum?', <https://stiftung-verantwortungseigentum.de/verantwortungseigentum> accessed 1 February 2023.

75. R.Schmidt and G. Spindler, 'Shareholder Value zwischen Ökonomie und Recht' in H.-D. Assmann and others (eds) *Freundesgabe für Friedrich Kübler* (CF Müller 1997) 515; P.O. Mülbert, 'Shareholder Value aus rechtlicher Sicht' (1997) Zeitschrift für Unternehmens– und Gesellschaftsrecht 129; A.V. Werder, 'Shareholder Value-Ansatz als (einzige) Richtschnur des Vorstandshandelns?' (1998) ZGR 69; H. Fleischer, 'Shareholder vs. Stakeholder: Ökonomische Fragen' in P. Hommelhoff, K.J. Hopt and A.V. Werder (eds) *Handbuch Corporate Governance* (Schaffer Poeschel 2010) 185; R.H. Schmidt and M. Weiß, 'Shareholder vs. Stakeholder: Aktienrechtliche Fragen' in P. Hommelhoff, K.J. Hopt and A.V. Werder (eds) *Handbuch Corporate Governance* (Schaffer Poeschel 2010) 161; H. Poeschl, *Strategische Unternehmensführung zwischen Shareholder-Value und Stakeholder-Value* (Springer Gabler 2010).

The concept builds on the tradition of family businesses, where family members see themselves as trustees for the next generation.[76] While this approach is rooted in the tradition of family businesses, steward-owners want to achieve the same commitment through legal rules in a family not of blood but of values. Another inspiration is the Nordic tradition of enterprise foundations discussed above. However, unlike a foundation with directors who are obliged to fulfil the wishes of the founder, steward-owners are free to develop the business as they wish.

There are also several differences between steward-ownership and the new legal forms for dual purpose enterprises, such as the US benefit corporation, and social enterprises. Two key differences are highlighted here:

- First, while benefit corporations combine purpose and profit for their shareholders, and some social enterprises may distribute some profits, steward-owned enterprises focus solely on their purpose.[77]
- Second, unlike most of the forms discussed above, there are no requirements as to the purpose of a steward-owned enterprise. It may aim to create social and environmental benefits, like a social enterprise, or it may simply aim to provide a useful product or service to its customers.

While there are obvious parallels with the concept of social entrepreneurship, there is an important difference in that steward-ownership does not limit the purpose of the organisation. The concept of steward-ownership does not require a value judgement as to what is a ‘good’ purpose, but it rather provides a framework for the long-term direction of the business structure. Within this structure, the managers of the company should be allowed to pursue the (legitimate) purpose they consider important. It could be a social or environmental purpose, as required for a social enterprise, or it could be something else, theoretically including the production of weapons. The proponents argue that, as long as society needs weapons for the police force and army, someone will have to produce them, and that it is preferable for such an entrepreneur to operate in a corporate form without the pressures of maximizing shareholder value. While there are therefore important differences in purpose, the asset lock serves comparable goals for steward-ownership and social entrepreneurship: Business decisions are not made to create private wealth for shareholders, but for reasons related to the purpose of the enterprise. As in a social enterprise, the irreversibility of the asset lock guarantees that various stakeholders, such as customers and employees, can trust that profits will be reinvested or donated rather than used for private wealth creation.

For example, these characteristics are an important element of the business model of a search engine like Ecosia. It becomes more valuable with each customer’s search. The asset lock guarantees that their contribution will not be used to make the founder, Christian Kroll, a millionaire by selling his business to Google. Another important aspect of steward-ownership is the cross-generational approach. Steward-owners run the business for the next generation, and the asset lock ensures that future generations adhere to the same principle. For example, a business owner who wants an employee to develop the business she has built may be willing to give it away, but probably not to allow the new owner to sell it and move to the south of France with the wealth built up by previous generations.

76. S. Kalss and S. Probst, *Familienunternehmen– Gesellschafts– und Zivilrechtliche Fragen* (Manz 2013) para 2-27; G. Krämer, *Sonderrecht der Familiengesellschaften* (Nomos 2019) 116ff; B. Felden, A. Hack and C. Hoon, *Management von Familienunternehmen* (2nd edn, Springler Gabler 2019) 18.

77. About the concept: <https://stiftung-verantwortungseigentum.de/fileadmin/user_upload/booklet/sve_booklet_digital.pdf>; <https://purpose-economy.org/content/uploads/purpose_book_de.pdf>.

b) The Draft Law

At present, steward-owned businesses use complicated structures which include foundations and limited companies to create the irreversible asset lock.[78] But entrepreneurs are calling for a simpler, more tailored corporate solution. Already before the last election in 2021, a group of academics, including the authors, drafted a proposal for the implementation of steward-ownership in German company law. In order to make the introduction as simple as possible, the group proposed the introduction as a variant of the German limited company, the GmbH.[79] However, the draft suggests that there may be advantages to introducing an entirely separate corporate form.

The draft law includes rules prohibiting the direct and indirect distribution of profits to its shareholders and governance rules to ensure that the asset lock is respected. It also requires that in the event of liquidation, after all debts have been paid and shareholders have been repaid their deposit, the remaining assets must be transferred to another steward-owned company or to a not-for-profit organisation with a complete asset lock. Furthermore, the draft excludes the conversion of such a steward-owned GmbH into other legal forms without asset lock; mergers are only possible with another steward-owned GmbH or as an acquiring legal entity.

In the absence of these provisions, the asset lock could be removed by conversion into or merger with another legal form without asset lock. For example, the employee mentioned above who received the shares in the company as a gift could convert it into a limited company under another legal regime without an asset lock and sell the company for his own profit. This risk would make the entrepreneur think twice before making the gift. As soon as such conversion possibilities exist, the promise made by the asset lock drastically loses credibility, regardless of whether the conversion takes place domestically or across borders with the participation of foreign legal entities. The central demand of the entrepreneurs represented by the *Stiftung Verantwortungseigentum e.V.*, namely to be able to legally secure the ownership of assets in the long term, can therefore only be achieved with a corresponding restriction of the possibilities for conversion, like those drafted by some European legislators for their new corporate forms and regimes. However, restrictions on cross-border company transactions naturally raise questions of European law, in particular with regard to their compatibility with the freedom of establishment under Articles 49 and 54 TFEU.[80]

II. Compliance with EU Treaty Law (in particular: Freedom of Establishment)

So far, there is no indication that the European Court of Justice (ECJ) might criticize the widespread rules on corporate asset locks or the corresponding restrictions on conversions and liquidations as being contrary to European law. No such concerns appear to have been raised in the 23 Member States that are discussing or have introduced such rules. To date,

78. Sanders (n 69).
79. A. Sanders and others, *Entwurf eines Gesetzes für die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen (GmbH-gebV)*, 2021 (available online at: <https://www.gesellschaft-mit-gebundenem-vermoegen.de/der-gesetzesentwurf/> accessed 1 February 2023) overview in A. Sanders and others, 'Gesetzesentwurf GmbH mit gebundenem Vermögen – Verantwortungseigentum 2.0' (2021) 112 GmbHR 285.
80. Engel and Haubner (n 73) 844.

there have been no known attempts to convert respective companies across borders. Nevertheless, the compatibility of corporate asset locks with European law needs to be clarified: if the ECJ were to hold that the permissibility of cross-border conversions of asset-locked companies into foreign companies that are not subject to such restrictions is required by European law, shareholders would be able to circumvent mandatory asset locks under their own national law by means of a cross-border conversion.

1. Scope of Application of the Fundamental Freedoms

a) Freedom of Movement of Capital or Freedom of Establishment

First of all, it has to be clarified which fundamental freedom is relevant. In addition to the freedom of establishment, the free movement of capital must also be taken into account, since the restrictions on conversion and liquidation options in the Member States affect not only the company but also its individual shareholders: their shares are limited in value by the corporate asset lock. However, according to the traditional definition of the ECJ, the freedom of establishment should take precedence over the free movement of capital.[81] In a company with a corporate asset lock, the shares of the company are characterized exclusively by administrative rights while they lack pecuniary rights. Therefore, entrepreneurial commitment rather than any investment purpose appears to be the primary motivation for shareholders to acquire shares. As a consequence, the freedom of establishment uder Art. 49 (1) TFEU applies instead of Art. 63 (1) TFEU.[82]

b) Companies pursuant to Art. 54 (2) TFEU

However, the scope of application of the freedom of establishment raises questions. Although Article 54 TFEU states that this fundamental freedom also applies to companies, it excludes companies 'which are non-profit-making' in para 2.[83] While companies with an asset lock cannot distribute profits, they are characterized by the fact that not only commercial activities are pursued at the level of the company, but that the generation of profits at this level is both permissible and entirely desirable.[84] Even rules that require asset-locked companies to pursue certain social purposes do not exclude the pursuit of (also) profit-making objectives. On the contrary, hybrid companies are defined precisely by the combination of profit and purpose. In fact, 'profit and purpose' has become the leitmotif of this new type of company.[85] In view of the German proposal for the GmbH-gebV, which deliberately renounces any legal specification of its purpose, there is a fortiori no doubt about the pursuit of profit-making purposes at company level.

81. For an overview on the delimitation of the freedom of establishment and the free movement of capital, see W. Schön, 'Free Movement of Capital and Freedom of Establishment' (2016) 17 EBOR 229.
82. In this direction Case C-685/16 EV [2018] ECLI:EU:C:2018:743, para 34; Case C-464/14 SECIL [2016] ECLI:EU:C:2016:896, para 33.
83. More closely S. Korte in C. Calliess and M. Ruffert (eds), *TFEU Art. 54* (2020) para. 10 et seq.; cf also Stefan Grundmann, *European Company Law* (Intersentia 2007) 122 para 214; J. Tiedje in H. von der Groeben, J. Schwarze and A. Hatje (eds), *TFEU Art. 54* (7th edn, 2015) para 22; more about the exclusion of non-profit organizations, see S. Lombardo, 'Some Reflections on Freedom of Establishment of Non-Profit Entities in the EU' (2013) 14 EBOR 225.
84. See already above, I.2.a).
85. That's the title of K. Westaway's influential book, *Profit & Purpose: How Social Innovation Is Transforming Business for Good* (Wiley 2014).

The exclusion of the distribution of profits does not, however, lead outside the scope of the freedom of establishment. In contrast to the definition of 'nonprofit enterprise' proposed by Henry Hansmann with reference to the non-distribution of profits,[86] the wording of Art. 54 (2) TFEU clearly refers to the company and not to its shareholders.[87] Irrespective of the possibility of distributing profits, the prevailing view focuses on whether the company (also) pursues profit-making purposes.[88] Even football clubs, which participate in economic life, are protected by the fundamental freedom, regardless of whether or not profit-making is part of their actual corporate purpose.[89] Accordingly, it is considered to be largely agreed (*annähernd geklärt*) that foundations with legal capacity can also be regarded as companies within the meaning of Article 54 (2) TFEU, provided that they offer services against payment.[90] According to this understanding, the scope of application of the freedom of establishment includes companies with a complete asset lock, as long as the pursuit of commercial purposes is not completely excluded.

c) System of Property Ownership pursuant to Art. 345 TFEU

On an impartial reading, one could consider the scope of application of the fundamental freedoms to be completely excluded because, according to Art. 345 TFEU, the European treaties in no way affect the rules in Member States governing the system of property ownership. In fact, the proposal on the GmbH-gebV, as well as comparable rules in other jurisdictions, not only regulate issues of company law, but at the same time also define ownership positions by attributing administrative rights to the respective company shares and, conversely, denying pecuniary rights. Accordingly, critics even fear an attack on private property and complain, for example, that the idea of responsible ownership hijacks the concept of property and turns it into the opposite.[91] Article 14 of the German constitution (*Grundgesetz*) is also partly brought into line.[92] Obviously, the share-based regulations of the proposal can indeed be understood as an element of the property system.

However, the ECJ has interpreted Art. 345 TFEU rather narrowly, namely in the so-called Golden Share rulings.[93] While the Advocate General argued that the European Treaties are neutral with regard to the economic ownership of companies, and that Art. 345

86. Hansmann (n 11), 835, 838.
87. This perspective also corresponds to the English language version, which is, however, considered to be misleading due to the reference to 'non-profits': D. Jakob and M. Uhl, in B. Gsell and others (eds), German Civil Code § 80 (2022) para 857.
88. cf Lombardo (n 83) 225-63 (proposing a uniform, European notion of non-profit entities).
89. Tiedje (n 83) art. 54 para. 22.
90. K. Werner Lange and S. Sabel, 'Nachfolgeplanung unter Einsatz ausländischer Stiftungen' (2014) 6 ZStV 201, 204; B. Weitemeyer, in German Civil Code, § 80 (9th edn, 2021) para. 314-319.
91. In this sense, for instance, Fabian Wendenburg, Managing Director of the Association of Family Businesses in Agriculture and Forestry and Chairman of the German Property Foundation; see T. Sigmund, T. Hoppe and L. Holzki, 'Widerstand gegen die "GmbH für Verantwortungseigentum" formiert sich' (*Handelsblatt*, 4 Oct. 2020) <https://www.handelsblatt.com/politik/deutschland/reformplaene-widerstand-gegen-die-gmbh-fuer-verantwortungseigentum-formiert-sich/26241812.html?ticket=ST-9172453-ZybVcJE9upHohsYd0bQA-ap6>.
92. See, for example, Burgard (n 73) 1 (without justification); cf the well-founded discussion in *Lomfeld and Neitzel* (n 73).
93. More on the Golden Shares rulings: T. Szabados, 'Recent Golden Share Cases in the Jurisprudence of the Court of Justice of the European Union' (2019) 16 German Law Journal 1099-130; Grundmann (n 83), 502ff, para 847; cf also S. Grundmann and F. Möslein, 'The Golden Share – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects' (2001-2002) Euredia 623-676; ids., 'Die Goldene Aktie' (2003) ZGR 317, 338ff.

TFEU therefore gave the Member States the power to restrict the opportunities for private equity to invest in privatized companies,[94] the Court of Justice held that the ownership system existing in the Member States was not exempt from the fundamental principles of the Treaties, and emphasized that the obligation to comply with European Union law also applied in this respect.[95] Thus, the undeniable link with the system of property ownership does not exempt the relevant rules from being subject to the fundamental freedoms.

2. Obstacle to the Freedom of Establishment?

The general exclusion of companies with an asset lock from the possibility of conversion could therefore constitute a violation of the freedom of establishment under Articles 49 and 54 TFEU. In accordance with the general scheme of the fundamental freedoms, it must first be examined whether the respective Member State's rules constitute an obstacle to the freedom of establishment before it can be considered whether there are any possible grounds for justification.

a) Ensuring Cross-border Transfer of Seat and Corporate Conversions

The freedom of establishment under Art. 54 (1) in conjunction with Art. 49 (1) TFEU has been applied by the European Court of Justice to cross-border transfers of registered offices as well as to (other) conversions of companies. In the *SEVIC* case, the ECJ considered cross-border mergers to be covered by the freedom of establishment[96] and later extended this protection also to cross-border conversions. In the *Cartesio* decision, the Court ruled that the State of incorporation may prevent the transfer of the registered office, but not the conversion into a company of the State of incorporation.[97] Accordingly, Member States have the power to prevent companies under their own national law from retaining that status if, by transferring their registered office across borders, they break the link provided for by the national law of their Member State of incorporation.[98] However, the ECJ takes a very different view of the situation where a company from one Member State transfers its registered office to another Member State, thereby changing the applicable national law and converting itself into a form of company governed by the national law of the second Member State: in that case, the power of the Member State 'cannot (…) justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member

94. Attorney General Ruíz-Jarabo Colomer, Opinion on Case C-367/98 *Commission v. Portugal* [2002] ECJ I-04731; Case C-483/99 *Commission v. France* [2002] ECR I-04781; Case C-503/99 *Commission v. Belgium* [2002] ECR I-04809, para 40 et seq.; id., Opinion on Case C-463/00 *Commission v. Spain* [2003] ECR I-04581; Case C-98/01 *Commission v. United Kingdom* [2003] ECR I-4641, paras 37, 54 et seq.
95. Case C-367/98 *Commission v. Portugal* [2002] ECJ I-04731, para 47 et seq.; Case C-483/99 *Commission v. France* [2002] ECR I-04781, para 43 et seq.; Case C-503/99 *Commission v. Belgium* [2002] ECR I-04809, para 43 et seq. See also Case C-463/00 *Commission v. Spain* [2003] ECR I-04581, para 67; Case C-98/01, *Commission v. United Kingdom* [2003] ECR I-4641, para 47 et seq.; Case C-171/08 *Commission v. Portugal* [2010] ECR I-06817, para 64; see also Case C-112/05 *Commission v. Germany* [2007] ECR I-08995 on the German Volkswagen Act.
96. Case C-411/03 *SEVIC Systems* [2005] I-10805; cf also Grundmann (n 83) 512, para 861.
97. Case C-210/06 *Cartesio* [2008] ECR I-09641; cf P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (OUP 2020) 851ff.
98. Case C-210/06 *Cartesio* [2008] ECR I-09641, para 110.

State, to the extent that it is permitted under that law to do so'.[99] Moreover, this power in no way implies that 'national legislation on the incorporation and winding-up of companies enjoys any immunity from the rules of the EC Treaty on freedom of establishment'.[100]

Later, in the *Vale* decision, the Court of Justice ruled that, in the case of a cross-border conversion, companies may also invoke the freedom of establishment vis-a-vis the country of residence.[101] A regulation that allows conversions only for domestic companies is contrary to European law if it lacks a corresponding justification.[102] Finally, in the *Polbud* decision, the ECJ ruled that a cross-border change of legal form is also covered by the freedom of establishment if the company merely transfers its registered office but retains its effective registered office in the original Member State.[103]

b) Protection against Discrimination vs. Prohibition of Restrictions

However, it does not necessarily follow from this case law that the exclusion of the possibility for companies with an asset lock to convert into other legal forms is to be qualified as an obstacle to the freedom of establishment. There is a fundamental difference to the facts decided by the ECJ in the above-mentioned cases if provisions such as Sections 77n-p of the German Draft Act also exclude the conversion of such companies into other legal forms without an asset lock in a domestic context. The ECJ has not yet had to decide on the case of companies whose conversion is already excluded under national law in purely domestic situations. Instead, all of the above cases concerned companies that could have converted domestically under their respective national conversion laws, but chose to do so on a cross-border basis. The crucial question in each case was whether the national law of the Member State of departure (*Cartesio*) or in the Member State of destination (*Vale*) could constitute an obstacle to such a cross-border conversion, which was answered in the negative by the ECJ.

While the case law has consistently dealt with cases of discrimination against cross-border situations as opposed to domestic conversions, it is still considered doubtful whether on the basis of the ECJ case law, cross-border conversions are generally protected by the prohibition of restrictions on the freedom of establishment, or whether they only enjoy protection against discrimination.[104] In any event, the *SEVIC* and *Vale* rulings can be interpreted as meaning that the freedom of establishment at least prohibits the host state only from unjustifiably discriminating against cross-border conversions.[105] The sweeping assertion that the freedom of establishment has evolved in the case law of the ECJ from a mere prohibition of discrimination to a prohibition of restrictions[106] is in any case inadequate.

At best, one could ascribe an asymmetrical protection to the freedom of establishment, which extends further in the home (outbound) Member State than in the host (inbound)

99. Case C-210/06 *Cartesio* [2008] ECR I-09641, para 112.
100. See again Case C-210/06 *Cartesio* [2008] ECR I-09641, para 112.
101. Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 33.
102. ibid para 41.
103. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804, EU:C:2017:804; Craig and de Búrca (n 97) 852ff; cf I. Basova, 'Cross-Border Conversions in the European Union After the Polbud Case' (2018) 1 Nordic Journal of European Law 63.
104. A. Ego, in *German Stock Corporation Act Vol. 7, European stock corporation law, B. European Freedom of establishment* (5th edn, 2021) para. 105. See also Grundmann (n 83) 125ff, para 121.
105. Case C-411/03 *SEVIC Systems* [2005] I-10805, paras 14 et seq., 18, 20, 22 et seq., 31; Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 30 et seq.; Ego (n 104), para 105.
106. Engel and Haubner (n 73) 844, 845ff.

Member State. Indeed, the *Cartesio* and *Polbud* judgments are sometimes interpreted as meaning that the founding or home Member State may not unjustifiably hinder its companies in the event of a change of legal form and is subject to a prohibition of restrictions that does not only prohibit discrimination against cross-border conversions.[107] According to this interpretation, the exclusion of the possibility of conversion for companies subject to an asset lock to convert in outbound cases would be problematic.

However, the case law provides only weak support for such an asymmetrical understanding of the freedom of establishment, since a change of legal form was not sought in *Cartesio* and was in principle possible in *Polbud*. Therefore, in both decisions, the ECJ had no reason to formulate the reservation that the outbound Member State must be aware of the domestic change of legal form. At most, the wording of Art. 54 TFEU provides some indication that cross-border changes of legal form are guaranteed to a greater extent vis-a-vis the outbound Member State than vis-a-vis the inbound Member State. Since the norm only protects companies 'formed in accordance with the law of a Member State', the formation of a company in the inbound (host) Member State can also be understood as a preliminary question of the freedom of establishment in the case of cross-border conversions, whereas the (originally) effective formation in the outbound Member State is in any case beyond doubt.

However, as this interpretation has not yet been confirmed by the ECJ, an asymmetry in the protection afforded by the freedom of establishment may be justifiably regarded as inconsistent.[108] For this reason, it is generally regarded as unproblematic under European law that, for example, neither the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) nor the German Transformation Act (*Umwandlungsgesetz – UmwG*) permit transformations of or into foundations that retain their identity. In this respect, the absence of discrimination is emphasized by many authors.[109]

c) Freedom to Choose the Legal Form

aa) Limitation to Congruent Foreign Forms

Even if one interprets the freedom of establishment vis-a-vis the state of incorporation as a prohibition of restrictions, this state is by no means obliged under European law to enable a change of legal form into any foreign legal form. The fundamental freedom in no way guarantees a comprehensive freedom of choice of legal form within the EU.[110]

For example, an obligation on Member States to enable the conversion of domestic foundations with legal capacity (which are protected by the freedom of establishment)[111] into foreign limited liability companies would clearly overstretch the protective purpose of the freedom of establishment. A cross-border move simply does not require the possibility of such a change of legal form, which would change the fundamental nature of the company. If Member States were nevertheless forced to open up this possibility, the characteristic requirements of the Member States' company or foundation laws would ultimately be

107. Ego (n 104), para 105.
108. ibid.
109. Weitemeyer (n 90), at § 80 para 319; Engel and Haubner (n 73) 844, 849. In the case of foundations with legal capacity, only the spin-off of an enterprise operated by the foundation is possible (cf section 161 German Conversion Act, *UmwG*), on this, eg R. Hüttemann and P. Rawert in W. Bayer and J. Vetter (eds) *Lutter Kommentar zum Umwandlungsgesetz § 161* (2023) para 1 et seq. Otherwise, the foundation is not covered by the German Conversion Act (cf sections 1, 3, 124 para 1, 175, 191 *UmwG*).
110. Engel and Haubner (n 73) 844, 845.
111. (n 90).

undermined. If, for example, a legal entity previously constituted as a foundation were to be converted into a limited liability company, it would no longer be a legal entity without members and endowed with assets for the permanent and sustainable fulfillment of a purpose specified by the founder[112] and would completely lose these essential characteristics of its previous legal form. Legal scholars, therefore, do not even question the fact that, under European law, foundations do not constitute a legal entity eligible for a (cross-border) change of legal form under the German Transformation Act (*UmwG*),[113] although foundations may well fall within the scope of the freedom of establishment.[114]

For other legal forms, however, it must also be possible to ensure that their typical legal features, ie the mandatory asset lock, are preserved in the event of a cross-border conversion. In principle, it is up to the national legislator to decide on the contours of its own legal forms.[115] Member States enjoy regulatory autonomy in the design of these features.[116]

bb) Absence of Congruent Legal Forms?

The freedom of choice of legal form granted by the freedom of establishment is thus limited to largely similar foreign legal forms. The cases decided by the ECJ all concerned conversions into a congruent legal form, such as the merger of a German AG with a Luxembourg SA (*SEVIC*).[117] A cross-border move does not require a conversion into an incongruent legal form. Incongruent conversions are therefore not covered by the freedom of establishment.[118] Accordingly, Member States are under no obligation under European law to enable changes of legal form into foreign legal forms that are not congruent in nature, unless they already enable such a change of legal form domestically (and thus the prohibition of discrimination applies).[119] As a result, the German legislator can easily restrict the cross-border conversion of a GmbH-gebV to such foreign legal forms which provide for a comparably strict asset lock and which also correspond to the other essential features of this legal form. The principle of effectiveness does not prevent such a restriction because the cross-border conversion fails due to the lack of essentially related foreign legal forms, but not due to the restriction by the German legislator.[120]

112. Thus section 80 para 1 sentence 1 German Civil Code. On the characteristics of the foundation: E. Müller, ‘Der Wesensgehalt der Rechtsform Stiftung’ (2021) 5 ZStV 167, 169ff.
113. In this sense, Engel and Haubner (n 73) 844, 849.
114. (n 90).
115. W. Schön, ‘Der Anspruch auf Haftungsbeschränkung im Europäischen Gesellschaftsrecht’ in *Festschrift für Peter Hommelhoff zum 70. Geburtstag* (Bernd Erle 2012) 1037, 1048ff; Engel and Haubner (n 73) 844, 847.
116. In detail D.A. Verse, ‘Niederlassungsfreiheit und grenzüberschreitende Sitzverlegung – Zwischenbilanz nach “National Grid Indus” und “Vale”’ (2013) 3 ZEuP 458, 487ff.
117. Case C-411/03 *SEVIC Systems* [2005] I-10805, para 2; Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para. 9 et seq (change of legal form of an Italian (S.r.l.) into a Hungarian (kft.) Company with limited liability); furthermore: OGH, 6 Ob 224/13d [2014] (change of legal form of an Italian S.a.s. into an Austrian KG); OLG Nürnberg, 12 W 520/13 [2013] (change of legal form of a Luxembourg (S.à.r.l.) into a German company with limited liability).
118. Engel and Haubner (n 73), 844, 849.
119. In more detail S. Kalss and C. Klampfl, in M.A. Dauses and M. Ludwigs (eds) *Handbuch des EU-Wirtschaftsrechts, E. III.* (2022) para 128. See also W. Bayer and J. Schmidt, ‘Das Vale-Urteil des EuGH: Die endgültige Bestätigung der Niederlassungsfreiheit als “Formwechselfreiheit”’ (2012) 31 ZIP 1481, 1488ff; P. Kindler, ‘Der reale Niederlassungsbegriff nach dem VALE-Urteil des EuGH’ (2012) 23 EuZW 888, 890; W.-H. Roth, ‘Internationalprivatrechtliche Aspekte der Personengesellschaften’ (2014) 43 ZGR 168, 207ff.
120. According to this provision, the exercise of the rights conferred by the Union legal order may not be rendered practically impossible or excessively difficult; restrictions on this freedom are only permissible for overriding reasons in the general interest, cf Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 48, 58.

As long as there was no legal form with a full, mandatory asset lock in other Member States, a prohibition on (cross-border) conversion would not go any further than such a restriction. However, if only one other Member State provides for a congruent legal form, such a prohibition would constitute an obstacle to the freedom of establishment.[121] Whereas the comparative survey has shown that many European jurisdictions provide for restrictions on profit distributions but do not offer legal forms with a strict asset lock, the Swedish *aktiebolag med vinstutdelningsbegränsning* (limited liability company with restricted distribution of profits) has great similarities. It is therefore not unlikely that it will be qualified as a congruent legal form by the ECJ. However, this Swedish legal form is relatively rare, thereby at least reducing the likeliness of a restriction to occur. Other Member States, in turn, are not obliged under European law to introduce a comparable legal form, since the freedom of establishment in the host state only includes a prohibition of discrimination pursuant to Art. 54 (2) TFEU.[122]

In order to ensure that the German provision complies with the fundamental freedoms, the German legislator could (or even should) provide for a restriction to transformations into more precisely defined, congruent foreign legal forms instead of the blanket prohibition of the current draft (cf Sec. 77n (3) to (5)).

cc) Irrelevance of Formal Typification

With respect to the current German draft, there is an additional issue of legal construction that needs to be clarified. In this draft, the new company form (GmbH-gebV) is formally construed as a subtype of the limited liability company (GmbH), although its substantive features, namely the asset lock, are very different from this conventional company form. Against this background, it has been argued that the cross-border conversion of the legal form of a GmbH-gebV into a foreign legal form similar to a GmbH should be regarded as congruent with the legal form, because on the basis of the current formal typification, the GmbH-gebV is to be regarded as a mere variant of the GmbH and not as an independent legal form.[123] However, this argument is not convincing. Regardless of the currently proposed embedding in the law on limited liability companies (GmbHG), it is already questionable whether the GmbH-gebV is a legal form variant at all.[124] In view of the fundamental structural differences between GmbH and GmbH-gebV, the latter could well be qualified as a separate legal form.[125]

Whether new corporate creations are designed as legal form variants or as (more or less) separate legal forms is ultimately a formal question of legislative construction.[126] In France, for example, the *société par actions simplifiée (SAS)* is regarded as a legal form 'in between' the *SA* and the *SARL*, but it is formally established as a legal variant of the *société ano-*

121. This is overlooked by Engel and Haubner (n 73) 844, 846; accordingly, the effectuation of the asset lock is by no means only relevant 'at the level of a possible justification'.

122. See above, II.2.b.

123. Engel and Haubner (n 73) 844, 845ff (emphasizing, however, that there are de facto no legal forms corresponding to the GmbH-gebV, 847).

124. On the design as a legal form variant of the *GmbH*, see Draft 2021, 21.

125. Fleischer (n 73), 345, 355. On the legal form variant as an institution under company law: J. Lieder and M. Becker, 'Das Sonderrecht der Rechtsformvarianten am Beispiel der UG' (2021) 9 NZG 357, 357; J. Lieder, 'Rechtsformvariante und Rechtsscheinhaftung – Ein Beitrag zur Institutionenbildung im Gesellschaftsrecht' in W. Bayer and P. Selentin (eds) *Festschrift 25 Jahre Deutesches Notarinstitut* (2018) 503, 504-12.

126. H. Fleischer, 'Ein Rundflug über Rechtsformneuschöpfungen im in– und ausländischen Gesellschaftsrecht' (2022) 18 NZG 827, 830ff ('small' vs 'large solution').

nyme,[127] even though there is a specific chapter in the Code de commerce (L. 227-1 et seq.) which is dedicated to this corporate form. The transitions between separate legal forms and form variants are also fluid. In Germany, Sections 105 (3) and 161 (2) of the Commercial Code (*Handelsgesetzbuch – HGB*) illustrate that independent legal forms do not require a complete set of rules, but can largely build on other legal forms: both provisions refer extensively to rules that are originally applicable to other legal forms. Given such references, it is difficult to measure the extent to which separate legal forms differ from other legal forms. Finally, one can also refer to the new legal forms introduced by Germany, France and several other Member States, following the ECJ case law on the freedom of establishment in order to compete with the UK limited liability company. The French *entreprise unipersonelle à responsabilité limitée (EURL)* and the German *Unternehmergesellschaft (UG (haftungsbeschränkt))* are formally subtypes of the respective limited liability company, but could just as well have been designed as separate legal forms. Indeed, the original proposal in Germany pointed in this direction.[128] Irrespective of their character as subtypes of limited liability companies, the specific features of these subtypes are likely to exclude cross-border conversions into the respective foreign basic legal form, in particular because of stricter capital requirements.[129] Finally, it follows from the legal concept of Art. 54 (2) TFEU that the contours of legal forms are left to the discretion of Member States with regard to these questions of formal typification and the structural design of legal rules.[130]

The assessment of whether domestic and foreign legal forms are doctrinally similar is to be decided by the ECJ regarding the scope of the freedom of establishment. This is also obvious because the answer to this question requires a legal comparison of the form-specific characteristics in different Member States. The legal technicalities at the level of Member State law do not play a role in this assessment under European law,[131] similar to the Golden Shares rulings on the free movement of capital.[132] To be on the safe side, however, it would make sense for the national legislator to create an independent legal form instead of a legal form variant.[133] In doing so, the legislator could work with references to other legal forms, eg to the law on limited liability companies or even cooperatives and foundations. In this way, practical experiences and case law can be taken into account, while at the same time

127. OECD, *Flexibility and Proportionality in Corporate Governance* (2018), 24.

128. During the legislative process, different versions have been discussed: Fleischer (n 126), 827, 830ff; U. Seibert, 'Ist es an der Zeit, den Rechtsformzusatz der Unternehmergesellschaft (haftungsbeschränkt) abzukürzen (§ 5a Abs. 1 GmbHG)?' in M. Hoffmann-Becking and P. Hommelhoff (eds) Festschrift für Gerd Krieger zum 70. Geburtstag (2020) 912; J. Gehb, G. Drange and M. Heckelmann, 'Gesellschaftsrechtlicher Typenzwang als Zwang zu neuem Gesellschaftstyp – Gemeinschaftsrecht fordert deutsche UGG' (2006) 3 NZG 88.

129. cf only J. Schmidt in L. Michalski and others (eds) *German Limited Liability Company Act (GmbHG)*, § 5a (2017) para 45 with further references.

130. (n 115).

131. In this sense (on golden shares): Grundmann and Möslein (n 93) 317, 322.

132. with further references: S. Grundmann and F. Möslein, 'Die Goldene Aktie und der Markt für Unternehmenskontrolle im Rechtsvergleich – insbesondere Staatskontrollrechte, Höchst– und Mehrfachstimmrechte sowie Übernahmeabwehrmaßnahmen' (2003) 102 Zeitschrift für Vergleichende Rechtswissenschaft 289, 301ff; F. Möslein, 'Kapitalverkehrsfreiheit und Gesellschaftsrecht' (2007) ZIP 208-09.

133. For its own legal form M. Reiff, 'Entwurf eines Gesetzes für die GmbH in Verantwortungseigentum (VE-GmbH) vorgelegt' (2020) 36 ZIP 1750, 1753; id., 'Verantwortungseigentum "mit gebundenem Vermögen"' (2021) 21 Neue Juristische Online-Zeitschrift 609, 611; in the draft itself, cf Draft 2021, 21ff, 53ff, 88ff. Rejecting a legal form variant of the GmbH: R. Kirchdörfer and R. Kögel, 'Die "GmbH im Verantwortungseigentum" VE-GmbH bzw. die "GmbH mit gebundenem Vermögen (GmbH-gebV)" – eine kritische Bewertung' in F. Bien and others (eds) *Maß– und Gradfragen im Wirtschaftsrecht: Festschrift für Wernhard Möschel zum 80. Geburtstag* (2021) 181, 208.

leaving the way open for tailor-made regulations that meet the specific needs of the companies.[134] However, (full) implementation in foundation law would not bring any advantages from a European perspective; moreover, it would not do justice to the entrepreneurial character of the social enterprise concept.[135] Irrespective of any legal technicalities, it is more than likely that the ECJ will qualify the asset lock as a specific and distinctive feature of the respective legal form.[136]

3. Level of Justification

Even if one wants to assume that there is a restriction of the freedom of establishment despite all these counter-arguments, there is still a possibility of justification. According to the established case law of the *ECJ*, there is no infringement of fundamental freedoms if restrictions are justified by written reasons for justification or by overriding reasons of the general interest. National rules must also be appropriate and necessary.[137] A number of justifications have already been recognized by the ECJ: in particular, the protection of creditors, minority shareholders and employees in the context of company law;[138] also recognized are fiscal interests,[139] environmental considerations,[140] the protection of fair trading[141] and the maintenance of the solvency of market participants.[142] However, this enumerative list remains open for future development, so that other interests may be protected by Member States.[143]

a) Overriding Reasons of General Interest

aa) Legislative Requirements of Corporate Purposes

Some authors claim that such a justification would always require a legislative requirement of charitable purposes.[144] While most (if not all) asset locks that have been introduced by

134. For this purpose: Draft 2021, 87ff.
135. This is indicated by Engel and Haubner (n 73)844, 849; Kirchdörfer and Kögel (n 133) 181, 208 advocating implementation in the form of a foundation; also Burgard (n 73) 1; as a result, also D. Markworth, 'Das Stiftungsrecht am Scheideweg' (2021) 3 NZG 100; a study published by the Family Business Foundation and drew up by Mathias Habersack and the International Performance Research Institute gGmbH (IPRI): *Foundation Companies in Germany* (2021) *passim*; A. Karst and R. Müller-Gschlößl, 'Die Gesellschaft mit beschränkter Haftung mit gebundenem Vermögen' (2021) 32 NJOZ 961, 964; L. Henn, *Zeitschrift für die notarielle Beratungs– und Beurkundungspraxis* (Otto Schmidt 2021) 241, 246; on the (de lege lata) unsuitability of the foundation, von Homeyer and Reiff (n 73) 224, 228ff; J. Veith, 'Die "Gesellschaft in Verantwortungseigentum" – Idee und Umsetzbarkeit nach aktueller Rechtslage' (2019) 1 Non Profit Law Yearbook 15, 18ff.
136. In fact, even critics concede that there are in fact no legal forms abroad corresponding to the GmbH-gebV, cf Engel and Haubner (n 73) 844, 847.
137. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.* [2017] EU:C:2017:804, para 52.
138. Case C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, [2017] EU:C:2017:804, para 54; Case C-411/03 *SEVIC Systems* [2005] I-10805, para 28; on employees, see Case C-201/15 *AGET Iraklis – Koinonikis Asfalisis kai Koinonikis Allilengyis* ECLI:EU:C:2016:972, para 73 with further references.
139. C-208/00, *Überseering* [2002] 2002 I-09919, para 92; Grundmann (n 83) 500ff, paras 844-45.
140. Case C-492/14 *Essent Belgium* [2016] ECLI:EU:C:2016:732, para 101; Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para 77.
141. Case C-378/10 *VALE Építési kft* [2012] EU:C:2012:440, para 39; Case C-411/03 *SEVIC Systems* [2005] I-10805, para 28; Case C-167/01 *Inspire Art* [2003] I-10155, para 132.
142. Case C-101/94 *Commission v. Italy* [1996] I-02691, para 23.
143. Korte (n 83) art. 49 para 74; from case law, for example, Case C-563/17 *Associação Peço a Palavra* [2019] ECLI:EU:C:2019:144, para 71 et seq. on air connections as a service of general interest.
144. Engel and Haubner (n 73) 844, 848.

European Member States are linked to such requirement,[145] the German legislative proposal does not require a commitment to a charitable purpose.[146] The basic idea is rather that the selection of 'good' corporate purposes should not be prescribed by the state but left to the companies. Provided that profit maximization does not determine corporate action, it seems very likely that companies pursue socially responsible or sustainable purposes. Such openness of purpose does not, however, stand in the way of justification: at the level of justification, it is not the concrete possibilities of individual companies to define purposes that are important, but the considerations of the legislator in enacting the relevant company law rules. Accordingly, in the Golden Shares rulings on the free movement of capital, the ECJ did not focus on the actual exercise of the special rights in question at the justification level, but on their legal basis.[147]

Therefore, it is not corporate purposes that are to be justified, but the state measures that have been qualified as restrictions to the fundamental freedoms, in this case the statutory exclusion of the possibility of conversion. The lack of a purpose does not prevent this state measure from being justified, on the contrary. The purpose of the fundamental freedoms is to bind state action, not private action, by removing specific market entry barriers of the member states.[148] Demanding a limitation of corporate purposes at the level of justification would effectively counteract this function of the fundamental freedoms. From the European law standpoint, the legislator may therefore allow a free choice of corporate purposes beyond shareholder value, instead of making the obligation to pursue public welfare-oriented or charitable purposes a prerequisite for the choice of legal form.[149]

bb) Legislative Motives for Asset Locks

The justification therefore depends on the motives that led the lawmaker to enact the rules in question. In this respect, the legislative materials and in particular the justification of the law play a central role (but are, as a matter of fact, not yet available for the German draft).[150] For the time being, one can make do with the considerations of the initiators and the justification of the academic draft proposal, but one can also rely on the statements in the German coalition agreement. In the coalition agreement, companies with an asset lock are mentioned in connection with the national strategy for social enterprises, which is intended to provide greater support for companies oriented towards the common good and social innovations.[151] Improving the legal framework for social enterprises is also mentioned as a general objective.[152]

Accordingly, proponents argue that asset locks should enable a new form of entrepreneurship with long-term preservation of independence and commitment to a corporate

145. See above, at I.1.a.bb.
146. Draft 2021, 24ff.
147. See, for example, Case C-543/08 *Commission v. Portugal* [2010] I-11245, paras 90-92; with a different tendency, however, Advocate General Colomer, Opinion on Case C-367/98, *Commission v. Portugal* [2002] I-4733, paras 67, 70 and 90 et seq.; cf also Grundmann and Möslein (n 93) 317, 340.
148. In the context of freedom of establishment, C. Tietje, '§ 10 Freedom of Establishment' in *European Fundamental Rights and Freedoms* (Dirk Ehlers 2007) 281, 281ff.
149. In general, on the relevance of purpose in the nonprofit sector: F. Möslein in *The Law of Third Sector Organizations in Europe: Foundations, Trends and Prospects* (Fici 2022) 1.2.
150. See, for example, Advocate General Kokott, Opinion on Case C-48/13 *Nordea Bank Danmark – Skatteministerie* [2014], ECLI:EU:C:2014:2087, para 59.
151. Coalition Agreement 2021-2025 (n 72) 30.
152. ibid J. Göttel, 'Was die Ampel für gemeinnützige Organisationen, Sozialunternehmen und das Ehrenamt plant' (2022) 1 npoR 17, 18; D. Rubner and D. Leuering, 'Das Gesellschaftsrecht im Koalitionsvertrag' (2022) 1 Neue Juristische Wochenschrift Spezial 15.

purpose.[153] A commitment to a purpose that goes beyond profit-making is seen by economists as an important step towards developing the sustainable economy of the future.[154] Business decisions should be able to be made with a view to the corporate purpose, to the well-being of the environment, customers and employees, rather than with a view to shareholder value. Conversely, shareholder value orientation is seen as a major obstacle to the development of sustainable entrepreneurship.[155] However, purpose orientation can only have a positive impact if this commitment goes beyond mere lip service and greenwashing.[156] The concept to be implemented by the German draft on the GmbH-gebV takes a radical approach in that the exclusion of dividend rights precludes any focus on shareholder value.[157] In this way, the asset lock is thus intended to create a framework within which socially, economically and environmentally sustainable entrepreneurship can develop, thus indirectly serving sustainability goals.

The companies organised in the *Stiftung Verantwortungseigentum e.V.* illustrate the entrepreneurial commitment within the framework of this freedom of choice.[158] The search engine Ecosia, for example, wants to ensure that the increase in value of the search engine generated by customer use cannot be appropriated by the shareholders, but instead benefits the purpose of the company, ie the planting of trees. The aim of the legal form is to preserve independent companies that are not sold to large competitors after just a few years. The aim is to maintain a diverse business landscape and to counteract corporate concentration. The corporate structure is thus intended to create a framework for the credible pursuit of purpose and stakeholder orientation.[159] Customers and employees should be able to trust that the decision against shareholder value orientation will not be reversed. The strong reactions to Nestlé recent acquisition of the spice retailer Ankerkraut give an idea of the importance of such trust.[160] For Generation Z in particular, questions of meaning and credible statements of commitment from employers can play an important role in their career choices.[161] When employees make company-specific investments in the belief that such promises will be kept, their trust deserves legal protection. Particularly in the age of the platform economy, customers are also concerned about whom they enter into contractual relationships with and entrust with their data. In the case of for-profit companies, they have to fear that network effects will be used to extract monopoly profits. Since only asset locks can credibly guarantee the renunciation of such profits, companies such as Ecosia, Signal, Mozilla Firefox and Startnext do operate on the basis of structures that guarantee the lock-in of corporate assets.[162] The proposed rules aim to legally protect the legitimate trust of employees and customers by permanently securing the promise of no profit distributions.

153. A. Bruce and C. Jeromin, *Corporate Purpose – das Erfolgsrezept der Zukunft* (Aufl 2020) 161ff; on purpose: H. Fleischer, 'A Management Concept and its Implications for Company Law' (2021) 18 ECFR 161; Edmans (n 2).
154. C. Mayer, *Prosperity* (OUP 2018); Edmans (n 2).
155. B. Sjåfjell and others, 'Shareholder primacy: the main barrier to sustainable companies' in B. Sjåfjell and B.J. Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (CUP 2015) 79.
156. R. Gulati, *Deep Purpose* (Harper Business 2022) 4ff, 'convenient purpose'.
157. Noah Neitzel, 'Vermögensbindung und Nachhaltigkeit' (2022) 55 KJ 479.
158. Foundation for Steward-Ownership <https://stiftung-verantwortungseigentum.de/> (last visited Sept. 1, 2023).
159. Bruce and Jeromin (n 153) 161ff.
160. See only S. Diemand, 'Großkonzerne essen Seele auf' (*Frankfurter Allgemeine Zeitung*, 16 May 2022).
161. See, for example, C. Scholz, *Generation Z 190-198* (2014). See also the contributions in A. Esmailzadeh and others, *GenZ: Für Entscheider:innen* (Campus Verlag 2022).
162. S. Verantwortungseigentum, *Eine Eigentumsform für langfristig werteorientiertes Unternehmertum*, 40 <https://verantwortungseigentum.com/verantwortungseigentum.html>.

cc) Sustainability as a Justification

In the context of fundamental freedoms, it is important whether these considerations are recognized in European law. From the outset, the EU Treaty links the creation of the internal market with the requirement of a 'sustainable development of Europe based on balanced economic growth' (Article 3 no. 3 TEU).[163] Thus, the European treaties themselves enshrine the goal of sustainability.[164] In addition, the horizontal clauses of the TFEU have an indicative effect. In particular, the general clause in Art. 11 TFEU on environmental protection is interpreted broadly to include economic and social concerns.[165] In addition, there are references to consumer, animal and health protection (Art. 12, 13 and 168 (1) TFEU). Regulations dealing with EU policies, such as industrial policy (Art. 173 (3) para. 1 sentence 1 TFEU), refer to EU initiatives, but at the same time extend to the recognition of parallel efforts of the Member States.[166]

Accordingly, the EU's many initiatives on sustainability goals, such as the European Union 2001 and 2006 Sustainable Development Strategies, are significant.[167] In addition, there are the sustainability disclosure requirements in the financial services sector[168] and, most recently, the proposal for a directive on corporate sustainability due diligence.[169] The EU also wants to encourage a move towards social and long-term oriented entrepreneurship.[170] The longevity of companies and the resulting 'sustainable economic growth' are key demands of the EU sustainability strategy.[171] At the same time, the European Commission links social entrepreneurship to sustainability goals. For example, its Social Entrepreneurship Initiative states that social enterprises 'create sustainable growth by taking into account their environmental impact and by their long-term vision'.[172] At the same time, the European Economic and Social Committee explicitly urges Member States to adopt 'creative ways of supporting expenditure aimed at sustainable economic growth'.[173] With its focus on non-profit entities, also the recent draft proposal for a European cross border association

163. To this, see N. De Sadeleer, *EU Environmental Law and the Internal Market* (OUP 2014); L.A. Avilés, 'Sustainable Development and the Legal Protection of the Environment in Europe' (2012) 7 Sustainable Development Law and Policy 28.
164. Engel and Haubner (n 73) 844, 848.
165. See, for example, M. Nettesheim in *Das Recht Der Europäischen Union* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim), TFEU Art. 191 (2022) para 123.
166. J. Ukrow and G. Ress, in *Das Recht Der Europäischen Union* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim), TFEU Art. 63 (2002) para 273.
167. Commission Communication of 15 May 2001, COM (2001) 264; Council of the European Union of 9 June 2006, 10 117/06 ENV 335 and Commission Communication of 24 July 2009, COM (2009) 400 final.
168. See Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, 2019 OJ L317/1 and Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, 2019 OJ L317/17.
169. COM (2022) 71 final.
170. eg European Commission, 'Social Entrepreneurship Initiative' (2014) <https://ec.europa.eu/docsroom/documents/14583/attachments/3/translations/en/renditions/pdf>; in the area of CSR and sustainable finance, see also the comparative law study European Commission, 'Social enterprises and their ecosystems in Europe' (2020) <https://op.europa.eu/en/publication-detail/-/publication/4985a489-73ed-11ea-a07e-01aa75ed71a1/language-en/format-PDF/source-123378057>; as well as European Union, 'Action Plan Financing Sustainable Growth' COM(2018) 97 p. 4, 12. See also and with further references Möslein (n 13) 175-76ff.
171. For example: European Parliament Resolution of 10 March 2022 on the European Semester for economic policy coordination: Annual Sustainable Growth Survey 2022 (2022/2006(INI).
172. European Commission, 'Social Business Initiative' COM(2011) 682 final, at p. 3.
173. Opinion of the European Economic and Social Committee on Enhancing sustainable economic growth across the EU, 2020 OJ (C 364/29) 30.

of September 5th 2023 (2023/0315) plays a role at the justification level: In Art. 2 lit. c of this proposal, the European lawmaker recognizes the existence of entities that, regardless of whether their activities are of an economic nature or not, can use any profits that they generate only in pursuit of their objectives, thereby excluding any profit distribution. At the level of existing secondary law, also the ECJ has already emphasised on several occasions that the prohibition of profit distributions is an important element of the non-profit status.[174] The link between asset locks and social and sustainable entrepreneurship has thus already been recognised in case law.

dd) Stabilization as a Justification

Asset locks serve other overriding reasons of general interest as well: it can have a stabilising effect on the market economy. At the very least, empirical studies suggest that asset-backed companies tend to last longer.[175] At the same time, a reduction in speculative transactions can be expected, as speculative acquisition of shares becomes less attractive if asset locks apply. Both of these mechanisms can be used to justify a restriction on the freedom of establishment, to the extent that such a restriction exists at all. In the context of restrictions on the free movement of capital introduced by Cyprus, the European Commission has explicitly recognised the stability of the financial markets and the financial system as overriding reasons in the general interest.[176] A stabilisation of the financial markets by reducing speculative financial market transactions, as can be achieved, for example, by a financial transaction tax, can also be considered to be in the general interest.[177] What is recognized as a general interest in the context of the free movement of capital can also serve as a justification in the context of the freedom of establishment. Against this background, it seems very likely that the purposes served by the asset lock will be recognised as overriding reasons in the general interest and can justify a restriction of the freedom of establishment.

b) Appropriateness and Necessity

Finally, restrictions on the freedom of establishment must be appropriate and necessary to achieve the objective. At the level of this proportionality test, the achievability of sustainability goals is sometimes declared to be the general yardstick and the question is asked whether the introduction of the new legal form is suitable and necessary in view of these goals. However, since the restriction is not the corporate form as such (nor the asset lock), but rather the safeguarding of the asset lock through the prohibition of (cross-border) conversions, the appropriateness and necessity must be examined in this more specific respect.

aa) Achievement of Sustainability Goals

Since asset locks are not a mandatory requirement for sustainable business, but responsible entrepreneurship is in fact practiced in many different forms,[178] doubts are sometimes expressed about its necessity.[179] In fact, there are legal forms or qualifications such as the

174. Most recently ECJ, Judg. v. 7.7.2022, Cases C-213 and 214/21, ECJ Judt. v. 7.7.2022 – C-214/21, para 34; similarly ECJ, Judg. v. 21.3.2019, Case C-465/17, BeckRS 2019, 3869, para 59 (Falck Rettungsdienste and Falck).
175. Sanders and Thomsen (n 68) 127ff.
176. For more details, see Ukrow and Ress (n 165) art. 63 para 308.
177. See, for example, F. Mayer and C. Heidfeld, Europarechtliche Aspekte einer Finanztransaktionssteuer (2011) 10 EuZW 373, 378.
178. Draft 2021, 11.
179. Engel and Haubner (n 73) 844, 848.

benefit corporation and the *société à mission* that serve sustainability goals without providing for a strict mandatory asset lock.[180]

Conversely, these legal forms are based on a purpose specified by the legislator which aims to promote the common good.[181] As a result of this specification, these forms do not necessarily provide more scope for entrepreneurial activity than a legal form which instead provides for an asset lock. For example, the provision of a search engine cannot be qualified as a charitable purpose per se, nor can the operation of a deposit system for coffee cups. Purpose-linked legal forms are therefore not necessarily available for respective companies, even though their business models may well serve sustainability in a more general sense. In addition, purpose requirements limit entrepreneurial scope with a certain degree of arbitrariness, as there are no uniform, universally recognized catalogues of charitable purposes at either the European or the Member State level. Moreover, such catalogues are not likely to be open to future development, while the concept and needs of public welfare necessarily change over time. As a result of the current *Zeitenwende*, this dynamic of change is particularly evident in connection with the war in Ukraine, as it suddenly seems conceivable that not only energy production with coal and nuclear power, but even the production of weapons can somehow contribute to the common good.[182] Whether purpose specifications or asset locks are the less restrictive measure is by no means obvious. Even rules that provide for only partial asset locks are not necessarily less intrusive than complete asset locks, because and to the extent that (as in the foreign legal forms mentioned)[183] these rules are often additionally linked to specified purposes, which in turn also restricts the scope for entrepreneurial activity.

More generally, the necessity is also questioned because, unlike the EU Taxonomy Regulation for instance, the German draft does not formulate specific sustainability criteria.[184] However, more specific sustainability requirements restrict the addressees of the regulation to an even larger extent than more general regulations. Such specifications are therefore certainly not a less restrictive measure. It would be downright absurd if regulatory instruments that leave companies more scope for entrepreneurial activity were more difficult to justify in the context of fundamental freedoms than more dirigiste instruments, whose compatibility with the market economy concept of the internal market is questionable.[185] For reasons of legal systematics, the secondary law provisions of the EU Taxonomy Regulation cannot serve as a yardstick for the justification of the freedom of establishment under EU primary law.

180. In more detail E. Cohen, *La société à mission, La loi Pacte: enjeux pratiques de l'entreprise réinventée* (Hermann 2019); see already above I.1.a.bb; (n 51); on the *société à mission*, also H. Fleischer, 'Gesetzliche Zertifizierung nachhaltiger Unternehmen – Die französische "société à mission" als Vorbild für Deutschland?' (2021) 34 NZG 1525, 1526ff; J. Sahbatou, 'Nachhaltige Unternehmensführung in Frankreich' (2022) 2 EuZW 59, 61 and in detail C. Bochmann and S. Leclerc, 'Die Verankerung von Nachhaltigkeitszielen in den Gesellschaftsstatuten bei der französischen société à mission' (2021) 21 GmbHR 1141 .
181. In more detail Fleischer (n 179) 1525, 1527; Möslein and Mittwoch (n 7) 399, 412ff.
182. eg W. Frenz, 'Rohstoffe für die Energiewende angesichts des Russland-Ukraine-Kriegs' (2022) 7 Zeitschrift für das gesamte Recht der Energiewirtschaft 243; M. Ludwigs, 'Gewährleistung der Energieversorgungssicherheit in Krisenzeiten' (2022) 15 Neue Zeitschrift für Verwaltungsrecht 1086; D. Blöcher and T.R. Salomon, 'In Zeiten der Zeitenwende: Der russische Angriffskrieg gegen die Ukraine' (2022) Zeitschrift für das Gesamte Sicherheitsrecht Sonderausgabe 1.
183. See already above, I.1.
184. Engel and Haubner (n 73) 844, 848.
185. In this direction, for example, H.-W. Sinn, 'Grüne Kernkraft', (Finanz und Wirtschaft, 26 January 2022) <https://www.fuw.ch/article/gruene-kernkraft.>

Against the background of the tension between purpose specification and asset lock and the intrusiveness of specific sustainability criteria, it is to be expected that the ECJ will leave to Member States the option of innovating legal forms in order to promote sustainability. In the context of the proportionality test, the Court of Justice is known to leave a wide margin of discretion to Member States and to exercise control only in the case of manifest errors of judgment.[186] Since no clearly preferable regulatory instruments have yet emerged in the field of sustainability regulation,[187] this prerogative of assessment is particularly important. Far from being an obstacle to this prerogative,[188] different regulatory options are in fact a precondition for legislative discretion.

Even if there are no serious doubts as to the suitability and necessity of respective legal forms, lawmakers may, as a precautionary measure, consider explicitly emphasizing a reference to sustainability. In addition to corresponding explanations in the explanatory memorandum to legislative proposals,[189] a general program sentence in the text of the law can be considered, explaining that the legal form should contribute to the achievement of sustainability goals. One possible formulation would be: 'The legal form should enable sustainable, independent value creation within the limits of planetary boundaries, and, in particular, protect the trust of employees and customers in the long-term pursuit of these goals'.

bb) Safeguarding the Asset Lock

Since it is not the introduction of the new legal form per se, but in particular the safeguarding of the asset lock through the prohibition of (cross-border) conversions that is intended to have an obstructive effect, the suitability and necessity must also be examined in this specific respect.

The suitability of the conversion prohibition to ensure the preservation of assets in the long term is obvious (and it is explained in more detail in the German draft).[190] However, it is questionable whether the prohibition of cross-border conversions is necessary. Some of the foreign rules on asset locks provide for alternative safeguards in the event of conversion, each of which is designed to ensure that the asset lock remains in place. Such rules can serve as an orientation for the German lawmaker. Being a milder measure than the blanket prohibition that is proposed in the draft, the above-mentioned possibility of a restriction to related foreign legal forms can be considered. To the extent that there are no legal forms with full asset locks in other Member States, such a restriction is tantamount to a ban. Under these circumstances, at least, it is not necessarily a less restrictive measure. As for further alternative solutions, the legislator could, for example, consider a full exit tax for asset-locked companies, or conversion rules providing for a transfer of tied assets to charities or other companies with locked assets. However, any such solution would need to be

186. For example, O. Langner, 'Das Kaufrecht auf dem Prüfstand der Warenverkehrsfreiheit des EG-Vertrages' (2001) 65 RabelsZ 222, 242; S. Heselhaus, 'Rechtfertigung unmittelbar diskriminierender Eingriffe in die Warenverkehrsfreiheit – Nationaler Umweltschutz in einem unvollkommenen Binnenmarkt' (2001) 21 EuZW 645, 648.

187. On this diversity, most recently W. Schön, '"Nachhaltigkeit" in der Unternehmensberichterstattung' (2022) 2 Zeitschrift für die gesamte Privatrechtswissenschaft 207, 222-230; F. Möslein and K.E. Sørensen, 'Nudging for Corporate Long-termism and Sustainability? Regulatory Instruments from a Comparative and Functional Perspective' (2018) 24 Columbia Journal of European Law 393.

188. In this direction, however, Engel and Haubner (n 73) 844, 848.

189. Draft 2021, 11 ('in the context of the worldwide search for suitable legal forms for sustainable entrepreneurship'), 12 ('sustainable, purpose-oriented economic activity' is to be made possible) and 16 ('aim of sustainable development of the independent enterprise').

190. Draft 2021, 22, 100.

specifically assessed as to whether it would be equally appropriate and less intrusive than the current proposed regime.

III. Compliance with European Secondary Law

At the level of secondary law, the so-called Mobility Directive, which creates a European legal framework for cross-border changes of legal form, is a potential source of friction.[191] The Directive amends the Company Law Directive[192] with new rules on cross-border changes of legal form in Chapter I of Title II. These strictly limit restrictions on such changes of legal form by defining not only the procedure but also the addressees of the protection (shareholders, creditors, and employees) and the instruments of protection.[193] However, this legal framework only covers the transformation of the legal form of certain corporations into a corporation governed by the law of another Member State while preserving their identity (cf Art. 86a of the Company Law Directive). The conformity with European law of regulations on new corporate forms such as the GmbH-gebV, therefore, depends on whether the respective legal form falls within this scope.

According to Art. 86a (1) of that Directive, it is only relevant whether the new legal form qualifies as a corporation within the meaning of the Directive.[194] Both for the companies wishing to carry out the cross-border change of legal form and for the legal forms of the country of residence into which these companies are to be converted, Art. 86b nos. 1 and 2 CRD refers to the legal forms listed in Annex II. For Germany, these are the stock corporation (Aktiengesellschaft, AG), the partnership limited by shares (Kommanditgesellschaft auf Aktien, KGaA) and the limited liability company (GmbH). As a result, the GmbH-gebV could indeed be regarded as a legal form variant of the GmbH.[195]

However, it is by no means clear whether variants of the legal forms listed in Annex II automatically fall within the scope of the Directive. For example, the partnership limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*), which is expressly covered, is a legal form variant of both the stock corporation and the limited partnership.[196] However, the latter, is undoubtedly not covered, if only because it does not count as a corporation.[197]

191. Directive 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 OJ L 321/1. The Directive would be the relevant yardstick with regard to European law if the new corporate form fell under it, see V. Obernosterer, 'Die GmbH mit gebundenem Vermögen – eine GmbH mit beschränkter Niederlassungsfreiheit' (2023) GmbH-Rundschau 434.
192. Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, 2017 OJ L169/46.
193. More closely J. Schmidt, 'Grenzüberschreitender Formwechsel in der EU: Eckpunkte des Rechtsrahmens und Herausforderungen bei der Umsetzung' (2020) 3 ZEuP 565; J. Brehm and K. Schümmer, 'Grenzüberschreitende Umwandlungen nach der neuen Richtlinie über grenzüberschreitende Umwandlungen, Verschmelzungen und Spaltungen' (2020) 14 NZG 538. See also the contributions in T. Papadopoulos, *Cross-Border Mergers: EU Perspectives and national experiences* (Springer 2019).
194. Schmidt (n 193) 565, 567ff; Brehm and Schümmer (n 193) 538, 539.
195. Engel and Haubner (n 73), 844, 846; see also Obernosterer (n 191).
196. J. Koch in *German Stock Corporation Act* (Uwe Hüffer & Jens Koch eds, 16th edn, 2022), section 278, para 3; A. Arnold in *Company Law* (Martin Henssler & Lutz Strohn eds, 5th edn, 2021), section 278, para 1.
197. On the non-extension of the directive to partnerships, J. Bormann and P. Stelmaszczyk, 'Grenzüberschreitende Verschmelzungen nach dem EU-Company Law Package' (2019) 7 ZIP 300, 302; W. Bayer and J. Schmidt, 'BB-Gesetzgebungs– und Rechtsprechungsreport zum Europäischen Unternehmensrecht 2018/19 – Teil I: Company Law Package' (2019) 34 BB 1922, 1926; M. Habersack, 'Sekundärrechtlicher

Conversely, in France, for example, the *société par actions simplifiée (SAS)* is designated as an independent entity, although it can be understood as a legal form variant of the regular corporation (*société anonyme*). Formally, however, the *SAS* is regulated independently in French law.[198] Other legal form variants, such as the German *UG (haftungsbeschränkt)* or the French *société par actions simplifiée unipersonnelle (SASU)*, are designed in the same way, but whether they are covered by the Directive does not seem to have been discussed so far. Up to now, it has been assumed that even the cross-border nature of a change of legal form cannot change the fact that a German *UG (haftungsbeschränkt)* is excluded as a target legal entity under Section 5a (2) sentence 2 of the German Limited Liability Companies Act (GmbHG).[199] The new legal rules for the implementation of the Transformation Directive, which came into power on 1 March 2023, apparently does not intend to change this and does not provide for new regulations for the *UG (haftungsbeschränkt)*.[200] This indicates that the German legislator does not consider this legal form variant of the GmbH to be covered by the Directive (in contrast to the GmbH). A further indication that it is not covered is the fact that some legal form variants have been included in the scope of another company law directive, the Digitization Directive,[201] by an explicit mention in the annex, namely the *SASU* and the *entreprise unipersonnelle à responsabilité limitée* as a variant of the *société à responsabilité limitée*. The German *UG (haftungsbeschränkt)*, however, is not mentioned, but has been included in the new regulations by the German transposing legislator.[202]

All in all, as in the context of the freedom of establishment, it can be argued with good reason that legal forms such as the GmbH-gebV are, due to their autonomy, outside of the scope of application of Art. 86a (1) of the Company Law Directive. However, a separate legal form would also provide greater clarity in this respect. A non-inclusion in Annex II would possibly have to be coordinated at the Union level. In any case, under this premise, the new legal form is not threatened by any secondary law illegality despite the prohibition of cross-border changes of legal form.

Conclusion

The first part of this article has shown the variety of new legal forms that have been developed for long-term, purpose-driven enterprises, and for social entrepreneurship. These

grenzüberschreitender Formwechsel ante portas' (2018) 182 ZHR 495, 497; H. Heckschen, 'Grenzüberschreitende Sitzverlegung und grenzüberschreitender Rechtsformwechsel' (2020) 23 Zeitschrift zum Gesellschafts– und Wirtschaftsrecht 449, 452; H. Wicke, 'Optionen und Komplikationen bei der Umsetzung des Richtlinienvorschlags zum grenzüberschreitenden Formwechsel (Teil I)' (2018) 50 DStR 2642-43.

198. Fleischer (n 126), 827, 830; on SAS S. Jung, C. Kühl & L. Wohlgemuth, in S. Jung, P. Krebs and S. Stiegler (eds) *Gesellschaftsrecht in Europa* (Nomos 2019), § 13, para 633-714.
199. R. Ege and S. Klett, 'Praxisfragen der grenzüberschreitenden Mobilität von Gesellschaften' (2012) 48 DStR 2442, 2444; H. Wicke, 'Zulässigkeit des grenzüberschreitenden Formwechsels – Rechtssache "Vale" des Europäischen Gerichtshofs zur Niderlassungsfreiheit' (2012) 35 DStR 1756, 1758.
200. German Federal Legal Gazette (Bundesgesetzblatt, BGBl) 2023 I Nr. 51; J. Schmidt, 'Der UmRUG-Referentenentwurf: Grenzüberschreitende Umwandlungen 2.0 – und vieles mehr' (2022) 13 NZG 579.
201. Directive 2019/1151 of the European Parliament and of the Council of 20 June 2019 amending Directive 2017/1132 as regards the use of digital tools and processes in company law, 2019 OJ L186/80.
202. Section 2 para 3 of the German Limited Liability Company Act (GmbHG); on this inclusion, for example H. Heckschen and R. Klaier, 'Weitere Digitalisierung des Gesellschaftsrechts' (2022) 19 NZG 885, 892; C. Linke, 'Gesetz zur Umsetzung der Digitalisierungsrichtlinie (DiRUG)' (2021) 8 NZG 309, 310.

include special limited liability companies, associations, cooperatives, and foundations. In addition, most European legal systems offer special regimes or labels for social enterprises that can be adopted irrespective of the legal form. These new forms and regimes include not only special provisions on purpose (1), but also governance mechanisms (2) and often a partial or complete asset lock (3). The article then has briefly introduced the concept of steward-ownership and the academic draft law proposing its implementation as a sub-form of the German limited liability company. The draft provides for a complete asset lock and special governance tools to ensure that shareholders act as trustees of the company purpose, rather than investors seeking profit maximisation. The European definitions of social entrepreneurship require that the purpose of a social enterprise must be used for its purpose rather than distributed. Steward-ownership follows a similar approach, but allows entrepreneurs to freely choose the (legal) purpose to be pursued, going beyond a fixed list of traditional social enterprise purposes.

In the second part, this article has shown that the introduction of a GmbH-gebV with its characteristic asset lock does not raise any fundamental objections under EU law. Although the freedom of establishment is applicable, the safeguarding of the asset lock by the prohibition of a (cross-border) change of legal form does not constitute an obstacle as long as there is a lack of congruent foreign legal forms. Even if an obstacle to the freedom of establishment is assumed, there are strong arguments in favour of justifying such restriction to the freedom of establishment. In order to ensure compliance with EU law, the current draft should be improved during the legislative process: (1.) Instead of being a special form of the GmbH, the company with asset lock should better be designed as an independent legal form which could contain references to legal provisions of limited liability companies, foundations and cooperations. A new legal form would not need to be included in the Annex to the Mobility Directive (cf III.). (2.) The objective of the legal form, ie to enable sustainable, long-term value creation while preserving assets, and to ensure confidence in these objectives, especially among employees and customers, should be enshrined in the law itself as a mission statement and objective of the legal form. (3.) Contrary to the complete exclusion of conversion provided for in the current draft, cross-border conversion into other foreign legal forms of a similar nature – to be defined in more detail – should be permitted as long as the asset lock persists.

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IS PAYMENT A BLIND SPOT IN THE DEVELOPMENT OF CRYPTOCURRENCIES? A STUDY ON THE POWER TO DISCHARGE OF CRYPTOCURRENCIES IN FRENCH AND COLOMBIAN LAW[1]

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Crypto-currencies are not widely used as a means of payment in Colombia or the European Union. This observation leads us to question the compatibility of crypto-currencies with payment law, and in particular the conditions under which crypto-currencies can be admitted as having a power to discharge, from a Franco-Colombian perspective, which enables us to approach the issue through two civil law systems, albeit subject to different economic and political contexts. On analysis, French and Colombian payment law are ill-suited to crypto-currencies, admitting them only as a conventional means of payment, since they do not benefit from a universal power to discharge. Although the legislation applicable to crypto-currencies has recently been strengthened, notably with the MICA regulation in Europe, payment law still needs to be adapted to ensure that crypto-currencies are admitted as a genuine means of payment, even if this means enacting measures to protect certain users. How crypto-currencies are used will depend on the level of trust they can inspire.

Will it soon be possible to pay for one's *baguette* or *arepa* using a cryptocurrency?

1. The lukewarm reception of cryptocurrencies in the domain of payment in Europe – There has been an undeniable development of cryptocurrencies. Though, while the latter

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or virtual currencies, issued based on blockchain technology,[2] have significantly expanded, they have yet to be part of our daily lives as they have not become ordinary payment methods. That is what was revealed in a study published in December 2022 by the European Central Bank: though the Europeans use cryptocurrencies, even marginally, it is mainly for financial investment, and seldom as a means of payment.[3] That observation cannot but be surprising: virtual currencies have not become usual in the context of payment, even though the primary purpose of the blockchain was precisely to create an alternative payment system.[4] Isn't the completion of that payment system, which encounters many resistances, an ordeal[5] for the global project supported by the 'crypto' revolution? Is payment destined to remain a blind spot in the development of cryptocurrencies? Beyond that question, is this a general situation or is it specific only to Europe?

2. On the usefulness of comparing French and Colombian law – In order to try to provide an answer to some questions that have been asked, comparing two countries like France and Colombia is undoubtedly useful, and for two reasons at least. The first is that those countries have a civil-law tradition: French law and Colombian law belong to the same

2. See, in general, esp. M. Mekki, 'Les mystères de la blockchain' (2017) Recueil Dalloz, 2160; G. Canivet, 'Blockchain et régulation' (2017) N° 36 *JCP E* 1469; P. Barban and V. Magnier (eds), *Blockchain et droit des sociétés* (Dalloz 2019) esp. 'Introduction', 7, N°s 4 to 8; N. Laurent-Bonne, 'La re-féodalisation du droit par la blockchain' (2019) Dalloz IP/IT 416; H. de Vauplane, 'Les nouvelles représentations monétaires: crypto-monnaies, stablecoins, monnaies digitales des banques centrales' (2020) N° 3 Revue de Droit bancaire et financier File 15; M. Audit, 'Le droit international privé confronté à la blockchain' (2020) N° 4 Revue critique de droit international privé 669, 669-672; P. Barban (coord.), File 'Le recours à la technologie blockchain en droit des sociétés' (2021) N° 178 Actes pratiques et ingénierie sociétaire, 3 and esp. P. Barban, M. Julienne, 'Notions de base sur la *blockchain*', esp. 4-5; G. A. Noriega C., '¿Blockchain es más que criptomonedas? presente y futuro' (2022) N° 29 Apuntes contables, Facultad de contaduría pública – Universidad Externado de Colombia, 51. See also esp. on technical aspects, P. De Filippi, *Blockchain et cryptomonnaies* (2nd edn, Que sais-je?, Puf 2022).
   See also the series of conferences organised by Institut de Recherche pour un Droit attractif and the French Cour de Cassation, esp. <https://www.courdecassation.fr/agenda-evenementiel/intelligence-artificielle-et-droit-des-contrats>, the collected papers of which are published in 'Dossier: La *blockchain*: de la technologie à la technique juridique' (2019) Dalloz IP/IT 414ff and <https://www.courdecassation.fr/agenda-evenementiel/de-la-technologie-des-algorithmes-la-technique-juridique> accessed 26 February 2023.
3. *Study on the payment attitudes of consumers in the euro area* (SPACE) – 2022, December 2022, European Central Bank, Eurosystem, 56-57. <https://www.ecb.europa.eu/stats/ecb_surveys/space/html/ecb.spacereport202212~783ffdf46e.en.html#toc6> accessed 26 February 2023.
4. See G. Gensler, Chair of the US Security and Exchange Commission, Speech 'Statement on Financial Stability Oversight Council's Report on Digital Asset Financial Stability Risks and Regulation Before the Financial Stability Oversight Council Open Meeting', Oct. 3 2022, <https://www.sec.gov/news/speech/gensler-statement-fsoc-meeting-100322> accessed 26 February 2023: 'The first big crypto token, was proposed 14 years ago this month, on a cypher-punk mailing list' and calling the crypto-asset market 'teenager'. See also, mentioning the 'exaggerated ambition' of the blockchain, P. Barban and V. Magnier, 'Avant-propos' in *Blockchain et droit des sociétés* (n 2) 3, as well as 'Introduction' on Bitcoin as the 'first application' of the blockchain. Some Colombian authors make the same remark: G. A. Noriega C., '¿Blockchain es más que criptomonedas? presente y futuro' (n 2) 50-51 and 62; J. A. Padilla Sánchez, 'Blockchain y contratos inteligentes: aproximación a sus problemáticas y retos jurídicos' (2020) N° 39 Revista de Derecho Privado, 182.
5. Compare, quoted by P. Storrer, '"The collapse of FTX", une histoire ordinaire?' (2023) N° 01 Bulletin Joly Bourse, 7, D. Beau in 'Le monde des crypto actifs: l'épreuve de vérité' in Le Figaro 6 January 2023 evoking the 'ordeal' <https://www.banque-france.fr/intervention/le-monde-des-crypto-actifs-lepreuve-de-verite> accessed 4 March 2023.

legal 'family', as René David called it,[6] or to a same system of law, as we would say today.[7] More precisely, they are two legal systems belonging to the Romano-Germanic family, which is mainly characterised by the strong influence of Roman law. That circumstance makes it easier to provide an 'efficient, ie accurate and precise, comparison'.[8] The second reason is that those two countries are in two different economic and monetary contexts. While France is a member of the European Union and, as a consequence, is within an economic zone of monetary integration, Colombia is one of the emerging economies most likely to consider cryptocurrencies as a solution to some difficulties, such as the inflation of the local currency.[9] One could also add that Salvador, a Latin-American country, now admits Bitcoin as legal tender.[10] Thus, comparing French and Colombian law will allow to develop a more global approach to the legal treatment of cryptocurrencies which are a global phenomenon. Beyond that, it will make it possible to show that legislators are more interested in regulating crypto-assets generally, without taking into account the specificities of cryptocurrencies, which leaves important questions without any answer. Similarly, the analysis of French and Colombian law will evidence that, independently of technical difficulties to comprehend cryptocurrencies as real currencies, the problems linked to their characterisation are above all issues of legal policy. Lastly, this study will show that, without denying how important the legal classification of cryptocurrencies is, the practical questions raised by the latter's accelerated development should elicit similar answers on the part of our legislators.

3. The weak reception of cryptocurrencies in the domain of payment in Colombia – In Colombia, it is possible to observe that cryptocurrencies are used for investment rather than payment,[11] and some authors underline that circumstance in order to question a system of regulation based on the almost exclusive role of cryptocurrencies as a means of exchange

6. R. David, C. Jauffret-Spinosi and M. Goré, *Les grands systèmes de droit contemporain (*12th edn, Dalloz 2016) N° 16, 15-16: 'There is an infinite diversity of laws, if one considers the content of their rules; it is less so if one considers the more fundamental and stable elements thanks to which it is possible to discover the rules, interpret them and clarify their value (…). The grouping of laws into families helps presenting and understanding today's different laws by reducing them to a limited number of types (…). The notion of 'families of laws' does not correspond to a biological reality; it is used for teaching purposes, as 'only a preliminary point', to highlight the similarities and differences between different laws'.
7. B. Martinez Cardenas, 'Nueva perspectiva del sistema de derecho continental en Colombia' (2011) Ano 17 N° 2 *Revista Ius and Praxis*, 26. See R. Legeais, *Grands systèmes de droit contemporains, Approche comparative* (3rd edn, LexisNexis 2016) N° 189, 113: 'Different words and expressions are used: system, family, group of systems that may be divided into subgroups rather than families (…). Despite its wear and tear, the notion of "family" can still be used, but it is not enough to present the legal systems, and that is why we think it is necessary to use the notions of "group" and "subgroup"'.
8. M. Fromont, 'Réflexions sur l'objet et les méthodes du droit comparé' in *Liber amicorum, Mélanges en l'honneur de Camille Jauffret-Spinosi* (Dalloz 2013) 387: 'Finally, it is only possible to compare laws within European or Western legal systems. Then those laws share enough common points to allow efficient, that is, accurate and precise comparison'.
9. That is the case of Argentina or Venezuela <https://www.elconfidencial.com/mundo/2021-09-09/Bitcoin-latinoamerica-el-salvador-devaluacion_3280922/> accessed 18 May 2023.
10. infra esp. N° 63.
11. J. Ochoa Hoyos, *Guía práctica sobre el tratamiento legal de las criptomonedas en Colombia: recomendaciones y reflexiones*, Centro de Estudios Regulatorios <https://www.cerlatam.com/publicaciones/guia-practica-sobre-el-tratamiento-legal-de-las-criptomonedas-en-colombia-recomendaciones-y-reflexiones/> accessed 25 February 2023; K.J. Carvajal Aragón, N. Rivillas Arrubla and J. Diego Sánchez Posada, *Tendencia en el uso del Bitcoin como medio de pago e inversión en Colombia entre los años 2017 al 2020*, Tecnológico de Antioquia Institución universitaria, Facultad de Ciencias Administrativas y Económicas, 2021, 32 <https://dspace.tdea.edu.co/bitstream/handle/tdea/1723/18.%20TG%20II%20-%20Rivillas%2C%20Sanchez%20y%20Carvajal.pdf?sequence=1&isAllowed=y> accessed 26 February 2023.

of goods and services, though it is not the only way they can be used.[12] It would thus seem, indeed, that the reception of cryptocurrencies in the area of payment remains rather weak not only in Europe but also in other countries, like Colombia. Based on that observation, and before studying the prospects of the primary purpose of the blockchain which is to create an alternative payment system, let us first come back to the technological revolution of the blockchain and cryptocurrencies.

4. The origins and the foundations of cryptocurrencies – This technology is not very recent. The blockchain, which was invented in the 1990s, developed thanks to the support of some groups – the cypherpunks, who, as early as the end of the 1970s, wanted to ensure that technological progress in cryptography would be democratically shared and decided to support privacy and freedom of expression in the digital space, together with crypto-anarchists, who wanted to be free from State yoke.[13] From that ideological perspective, the implementation of a system of decentralised payment appeared as a logical and necessary outcome.[14] Thus, at the heart of the reasons for the emerging of the blockchain, particularly of cryptocurrencies, there was a political, libertarian project which advocated for the establishment of monetary, cross-border, autonomous systems freed from the authority of the States.[15] The initial project was based on the claim that cryptocurrencies would be outside the law and would bring about a change in society.[16] Globally, what happens is disintermediation, as the intervention of usual trustworthy third-parties is replaced with a secured technology based on cryptography.[17] The implementation of an alternative payment system was thought to be all the more pressing as the financial crisis showed the failure of the institutional system.[18] After several attempts, Bitcoin was created in 2008 by Satoshi Nakamoto, whose identity remains unknown.[19] Technically speaking, Bitcoin is based on a blockchain which works thanks to 'double-key asymmetrical cryptography', ie the method allowing to authenticate transactions thanks to the use of a private key which is personal to the user and a public key which may be circulated.[20] The system implies the intervention of miners who allow for cryptocurrencies to be issued and for transactions realised in the blockchain to be recorded: those operations are subject to the identification of a more or less long series of characters which produces a 'digital fingerprint' authenticating the operation.[21] In so doing, they are involved in securing the process. The process is different from

12. J. Ochoa Hoyos (n 11).
13. P. De Filippi (n 2) 6ff. See also on the origin of the project, N. Laurent-Bonne (n 2) 416.
14. P. De Filippi (n 2) 9-10: 'For cypherpunks as well as crypto-anarchists, the disintermediating of financial transactions was one of the foundations on which to establish a new society ideal'.
15. See also on the political and philosophical foundations of the development of the blockchain and cryptocurrencies, D. Legeais, *Blockchain* (1st January 2020) JurisClasseur Droit bancaire et financier, nº 36ff.
16. See also A. d'Ornano, 'Sur le projet Libra' (2020) Nº 1 Revue critique de droit international privé, 178 on the 'society ambitions' of Libra; M. Audit (n 2) 674.
17. P. De Filippi (n 2) 3-5 and 104ff.
18. D. Plihon, *La monnaie et ses mécanismes* (8th edn , La Découverte 2022) 4 and 50-51.
19. P. De Filippi (n 2) 14.
20. P. De Filippi (n 2) 15-19. See also M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) Nº 6 Study 19 Revue de Droit bancaire et financier, nº 1.
21. P. De Filippi (n 2) 23ff and D. Legeais (n 15) nº 8.
Data miners are the natural or legal persons checking the transactions using cryptocurrencies and are therefore a sort of system administrators, only in that sense. They confirm each transaction via a complex mathematical process consisting in solving a cryptographic algorithm. After checking, the system creates a new node with the information of the transaction and, with the creation of that node, the cryptocurrency is transferred. When they have solved algorithms, data miners receive new cryptocurrencies. That is why they are also users of the system: S. Canales Gutiérrez, *Bitcoin, la moneda descentralizada de curso voluntario, como equivalente funcional del peso colombiano* (Ibáñez 2022) 46-47.

other forms – banknote-and-coin and scriptural – of currencies in that it no longer corresponds to writing but to a digital code,[22] as well as from the famous electronic money.[23] Actually, in French law, the latter is not really a currency.[24] It is not either in Colombian law, where it is considered as an electronic method of payment, which includes for example *Paypal*[25] or, according to some authors, as a digital representation of fiduciary currency having legal tender.[26] Cryptocurrencies are therefore a completely new process which is difficult to classify.

5. Uncertainties surrounding cryptocurrencies and the blockchain – Beyond that, this technological progress, which is slow, causes ambivalent reactions. Cryptocurrencies and the blockchain fuel important fears, which are a matter of concern for the national and international legislators and regulators.[27] The increased risk of money laundering, financing crime and terrorism has been underlined many times.[28] The environmental consequences linked to transactions realised on the blockchain, because of the high quantity of energy that is necessary, have become major concerns.[29] The existence of significant implications related to data protection has also been noted.[30] The recent bankruptcy of FTX in the United

22. H. de Vauplane (n 2) nº 1.
23. On the distinction between cryptocurrencies and electronic money, esp. N. Mathey, 'La nature juridique des monnaies alternatives à l'épreuve du paiement' (2016) Nº 6 File 41 Revue de Droit Bancaire et Financier, Nº 8; D. Carreau, C. Kleiner, 'Monnaie' (June 2017) Répertoire de droit international Dalloz, nº 12.
Contra according to whom stablecoins, when they are backed by legal tender, may be called electronic money in the sense of Article L. 315-1 of the French Monetary and Financial Code, C. Pommier, V. Mamelli, A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 1 – La présentation des actifs numériques, Chapitre 1 – Le développement de la cryptoéconomie' in *Rapport du 117e Congrès des notaires de France*, 2021, Nº 2-23 <https://rapport-congresdesnotaires.fr/2021-rapport-du-117e-congres/2021-co2-p1-t2-st1-c1/#ftn0031> accessed 2 March 2023.
Even though sometimes those two expressions are used as synonyms, at least by a few Colombian administrative authorities <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 25 February 2023.
24. Electronic money is defined in Article L. 315-1 I. of the Monetary and Financial Code as follows: 'Electronic money is a monetary value which is stored under a digital form, including a magnetic one, and represents a claim on the issuer which is issued on receipt of funds for payment purposes as defined in Article L. 133-3 and which is accepted by a natural or legal person other than the electronic money issuer.'
The mechanism would not be a new currency, but rather a new way of transferring scriptural money, using digital new information and Internet technologies (on that topic, esp. D. Plihon (n 18) nº 43 as well as N. Mathey (n 23) nº 8; J. François, *Traité de droit civil*, *Christian Larroumet (ed.), Tome 4, Les obligations, Régime général* (6th edn, Economica 2022) nº 61).
25. A. Barroilhet Díez, 'Criptomonedas, economía y derecho (2019) vol. 8 Nº 1 Revista Chilena de Derecho y Tecnología, 31.
26. M. Alonso Jiménez, 'La obligación dineraria y las criptomonedas como instrumento sustitutivo de pago', Blog de Derecho de los Negocios, Universidad Externado de Colombia, Bogotá, 2018 <https://dernegocios.uexternado.edu.co/negociacion/la-obligacion-dineraria-y-las-criptomonedas-como-instrumento-sustitutivo-de-pago/> accessed 25 February 2023.
27. G. Canivet (n 2).
28. Comp. P. De Filippi (n 2). 117-18 for whom the blockchain could be a solution to money laundering; F. Fleuret, A. Lourimi and W. O'Rorke, '3 questions. Vers un droit des crypto-actifs et de la blockchain? (2021) Nº 5 *JCP E* 85.
29. esp. P. De Filippi (n 2) 25, 35 on the energy costs of Bitcoin because of mining. See also G. A. Noriega C., '¿Blockchain es más que criptomonedas?, presente y futuro' (n 2) 51.
30. A. d'Ornano (n 16) 184; M. Aglietta and O. Lakomski-Laguerre, 'VII/ Les cryptomonnaies en plein essor: les banques centrales lèvent leurs boucliers!' in *L'économie mondiale* (CEPII, La Découverte 2021) 103-17; M. Pilkington, 'De Libra 1.0 à Libra 2.0 (Diem): entre échec programmé et pertinence renouvelée pour l'économie politique' (2022) 3 vol. 132 Revue d'économie politique, 397-420, esp. 409-11. It is quite reveal-

States has caused a good deal of commotion[31] and some platforms have asked for insolvency proceedings to be initiated.[32] Generally speaking, the process is a source of concern for the stability of the system given the risks it entails for its users.[33] Regulatory authorities thus regularly intervene by issuing general warnings,[34] or even deal with particular cases.[35] At the same time, however, the advantages of the blockchain for payment applications have been put forward, among which speed, reducing transaction costs, or even going beyond the diversity of national currencies.[36] One could also add that some political and economic contexts could bring about some renewed interest for cryptocurrencies, which explains why some Latin American States[37] are openly favourable to cryptocurrencies and regard them as a 'political tool for rebellion'[38] to challenge, in a way, the existing monetary order guided by global policies set by international institutions like the IMF, or at least to fight against rampant inflation which undermines trust in national currencies.[39] It is therefore in the context of a complex debate, which entails political if not ideological stances, that the leg-

ing of that issue that, in the last Colombian bill aiming to regulate cryptocurrencies and the approved version of the House of Representatives, that issue was raised: see Art. 4 (f) of Bill 139 of 2021 <http://svrpubindc.imprenta.gov.co/senado/index.xhtml> accessed 25 February 2023.

31. On that topic, P. Storrer, '"The collapse of FTX", une histoire ordinaire? (2023) N° 1 Bulletin Joly Bourse, 7, putting those concerns into perspective.
32. C. Boismain, 'Les détenteurs de crypto-monnaies sont-ils des créanciers chirographaires des plateformes d'échange? À propos de la procédure d'insolvabilité des plateformes Voyager et Celsius' (2022) N° 37 Recueil Dalloz, 1871.
33. T. Bonneau, *Régulation bancaire et financière européenne et internationale* (Bruylant 2022) n° 506.8.
34. For example, D. Beau, 'Comment assurer le bon fonctionnement de notre système de paiement?', Speech France Payments Forum, 9 November 2021 <https://acpr.banque-france.fr/intervention/comment-assurer-le-bon-fonctionnement-de-notre-systeme-de-paiement-lere-du-numerique-0> accessed 4 March 2023. See also European Banking Authority, 'Warning to consumers on virtual currencies', EBA/WRG/2013/01, 12 December 2013 <https://www.eba.europa.eu/eba-warns-consumers-on-virtual-currencies> accessed 4 March 2023, and more recently 'Crypto-assets: ESAs remind consumer about risks' <https://www.eba.europa.eu/financial-innovation-and-fintech/publications-on-financial-innovation/crypto-assets-esas-remind-consumers-about-risks> accessed 4 March 2023.
    On that topic, F. Drummond, 'Loi Pacte et actifs numériques' (2019) N° 4 Bull. Joly Bourse, 60, N° 3 highlighting the differences in points of view of the MFA and the Banque de France. That is the case in Colombia, where administrative authorities, via circulars, concepts and recommendations, warn the public in general and the monitored entities of the risks of operations in cryptocurrencies: in that sense Concepto C19-49344 of the Central Bank's Management <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/c19-49344> accessed 25 February 2023.
35. For example, recently, the proceedings of the SEC against crypto-currency investment firms <https://www.lesechos.fr/finance-marches/marches-financiers/cryptos-gemini-et-genesis-poursuivis-par-la-sec-1897138>. See also the case, in Colombia, in which the Superintendence of Companies launched an investigation against Ping Nine S.A.S., a multi-level marketing company, about a massive, regular and unauthorized collection of resources from the public via the mode of money collection in negotiations in cryptocurrencies <https://www.infolaft.com/supersociedades-frena-operacion-de-multinivel-de-criptomonedas> accessed 1 March 2023.
36. D. Legeais (n 15) n° 59. See also F. Drummond (n 34) n° 2.
37. That is the case especially of Salvador where Bitcoin has been granted legal tender status or Venezuela and Argentina, where the devaluation of the Bolivar and of the Peso is important <https://es.cointelegraph.com/news/cryptocurrencies-a-shelter-against-the-inflation-suffered-by-latin-america> accessed 3 March 2023). The case of Cuba is also revealing: Liliet Díaz De Armas, 'Las criptomonedas en Cuba. Su importancia en la economía' <https://webcache.googleusercontent.com/search?q=cache:-CF00PiezuEJ:https://dspace.uclv.edu.cu/bitstream/handle/123456789/13459/Liliet%2520D%25C3%25ADaz.%2520Convenci%25C3%25B3n.pdf%3Fsequence%3D1%26isAllowed%3Dy&cd=1&hl=fr&ct=clnk&gl=co> accessed 3 March 2023.
38. In that sense <https://elpais.com/economia/2021-09-04/las-criptomonedas-la-nueva-herramienta-politica-de-los-gobiernos-rebeldes-de-america-latina.html?event_log=go> accessed 3 March 2023.
39. <https://es.cointelegraph.com/news/cryptocurrencies-a-shelter-against-the-inflation-suffered-by-latin-america> accessed 3 March 2023.

islators are trying to build a way to deal with the technological innovation of the blockchain, and the products and methods resulting from it, which are not easily integrated into our usual categories.

6. The acceptance of the blockchain in French and Colombian law – In the domain of regulation,[40] the process of the blockchain has been admitted in French and Colombian law. In French law, Act N° 2019-486 of 22 May 2019 *on the growth and transformation of companies* called the Pacte Act has consecrated the Shared Digital Recording System which consists, pursuant to Article R. 211-9-7 of the Monetary and Financial Code, in a register '*designed and implemented to ensure the recording and integrity of entries and directly or indirectly allow to identify the holders of securities, the nature and number of held securities*'.[41] Moreover, the same text has included the digital assets in the Monetary and Financial Code at Article L. 54-10-1 – a category to which cryptocurrencies belong –[42] in order to control the providers of digital-asset services defined in Articles L. 54-10-2 and following of the same code.[43] At the European level, while cryptocurrencies remain excluded from the directive on payment services, which limits the possibility to control them, they have been included into the European anti-money laundering unit.[44] Beyond that, a new regulation will soon be applicable with the *Markets in Crypto-Assets* (MiCA) Regulation dated 24 September 2020.[45] Regulation of cryptocurrencies, which is still being built, is therefore progressively strengthened, with the idea of a moderate and controlled integration of the process. In Colombia, the National Development Plan (NDP)[46] 2018-2022, adopted by Act 1955 of 2019, expressly refers, in Article 147, to the phenomenon of public digital transformation. It must be underlined that the NDP is no longer applicable because of the change of government, which has proposed a new National Development Plan, adopted in Act 2294 of 2023. However, the former NDP provided, for example, that the State entities at national

40. T. Bonneau and T. Verbiest, *Fintech et Droit, Quelle régulation pour les nouveaux entrants du secteur bancaire et financier?* (2nd edn, Revue Banque 2020) 27ff.
41. Seelastly the amendment of that text by Decree N° 2023-421 of 31 May 2023 *on the adoption of securities law to the European regulation called 'pilot regime'* and Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 *on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) N° 600/2014 and (EU) N° 909/2014 and Directive 2014/65/EU* [2022] OJ L 151/1 <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX-%3A32022R0858> accessed on 2 July 2023. Compare with Art. L. 223-12 of the Monetary and Financial Code created by Order N° 2016-520 of 28 April 2016 *on savings bonds* then abrogated by Order N° 2021-1735 of 22 December 2021 *modernising the framework of crowdfunding.*
42. F. Drummond (n 34) n° 17; D. Legeais (n 15) n° 37, as well as n° 44; H. de Vauplane (n 2) n° 2.
43. F. Drummond (n 34).
44. T. Bonneau, *Droit bancaire* (14th edn, LGDJ 2021) n° 94.
Indeed, Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 *amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU* [2018] OJ L 156/43 gives, in Article 1, the following definition of virtual currencies: 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and can be transferred, stored and traded electronically'.
45. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 *on markets in crypto-assets, and amending Regulations (EU) N° 1093/2010 and (EU) N° 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937* [2023] OJ L 150/40. See on European regulation, T. Bonneau, Le 'Digital finance package', (2021) N° 1 Revue de Droit bancaire et financier, Study 1. J. Granotier, 'Finance numérique et marchés des crypto-actifs: l'Europe en pointe?' (2023) N° 2 Droit des sociétés, 2.
See developments infra n° 67 on the state of the European regulation.
46. It is the legal and formal instrument via which the Government sets its objectives allowing subsequent assessment of its management: see Art. 339 of the Political Constitution.

level would have to include into their action plans the digital transformation component. Specifically, Nº 6 of that provision provides that emerging technologies of the fourth industrial revolution must be given priority, including, in particular, Distributed Ledger Technologies (DLT), of which the blockchain is part.[47] The Minister of Information and Communication Technologies (MinTIC) also published two guide books, in 2020[48] and 2022[49], in order to stimulate the adoption and implementation of projects involving the blockchain technology for the Colombian State. Aside from that blockchain-favourable general regulation, the Colombian legislator remains silent on the question of cryptocurrencies, even though regulatory administrative authorities have issued many recommendations and releases on that topic.[50] In this context, the issue of payment seems nonetheless to have remained, in many respects, in the background, in French and in Colombian law. Payment in cryptocurrencies is not subject to specific regulation and therefore, in reality, comes under the common law of payment for a large part. That creates a grey area which is going to lead us to assess the discharging power of cryptocurrencies, and, from that perspective, the adaptability of cryptocurrencies to payment law or the necessity to adapt the latter to the former.

7. The main difficulties of a legal analysis of cryptocurrencies – A few preliminary remarks on that analysis should be made, in relation to the definition of the concepts at issue and difficulties of the matter. First, a legal study on cryptocurrencies comes up against the technical dryness of this process. The landscape of virtual currencies is extremely diverse. There are many cryptocurrencies which rely on different technical mechanisms. Then, the evolution of the technique on which those virtual currencies are based, in addition to its technical complexity, is quite fast. With the permanent development of correcting mechanisms,[51] the process seems to be undergoing constant renewal like the Lernaean Hydra and the analyst feels they are facing a Herculean ordeal. Second, whether cryptocurrencies have or may have a discharging power and therefore may become a real method of payment a priori refers to whether they have the capacity to be considered as currencies or real currencies. Deciding that issue encounters different difficulties. First, that of the characterisation as a currency, of the understanding of a concept which, in itself, is difficult to delineate. There has been a long debate, in which economists and jurists, and functional and material analyses have been opposed.[52] It reveals a paradox or even an aporia, which results from the fact that the capacity of cryptocurrencies to ensure payment would be part of their classification as currencies, but that their being classified as currencies would favour their being admitted as methods of payment.

47. Even though, on many occasions, the two words – blockchain and DLT technologies – are used as synonyms, some authors clarify their differences: <https://gobiernodigital.mintic.gov.co/692/articles-161810_pdf> accessed 1 March 2023. See also P. Sanz Bayón, 'Criptomonedas: naturaleza jurídica y regulación europea de los proveedores de servicios de cambio y custodia de monederos electrónicos' in L. F. López Roca, M. Baquero Herrera and J. A. Corredor Higuera (eds), *Los mercados financieros ante la disrupción de las nuevas tecnologías digitales* (Universidad Externado de Colombia 2021) 335, fn 6.
48. That guide is available at <https://gobiernodigital.mintic.gov.co/692/articles-161810_pdf> accessed 25 February 2023.
49. That guide is available at <https://drive.google.com/file/d/1wwiS8XSu4xLdkwhzW0w7D_7jmY7G_tpW/view> accessed 25 February 2023.
50. infra nº 20ff.
51. P. de Filippi (n 2) nº 39ff.
52. S. Boada Morales, 'La naturaleza jurídica de la cuenta bancaria' (2019) Nº 36 Revista de Derecho Privado, 177-78. See generally, infra nº 54ff.

8. Cryptocurrencies, payment and the power to discharge – The primary perspective of analysis should then consist in studying the compatibility of cryptocurrencies with payment law and, in particular, the regulation of the power to discharge in French and Colombian law. What is the power to discharge? It is the effect produced by valid payment. Pursuant to Article 1342 of the French Civil Code, payment – defined as 'the voluntary execution of a performance that is due'[53] – has, first, a discharging effect on the debtor 'in relation to the creditor' and, second, an extinctive effect except in case of personal subrogation of a third party.[54] Article 1626 of the Colombian Civil Code provides that payment is 'performance of what is owed'.[55] Apart from the voluntary character of the payment required by the French legislator, on which the Colombian legislator remains silent,[56] the discharging effect of the debtor 'in relation to the creditor' and the extinctive effect except personal subrogation of a third party[57] are similarly acknowledged in the two legal systems. Thus, the discharging power is the capacity of the performance of a service to discharge a debtor. However, in relation to cryptocurrencies, the issue of the discharging power becomes particular. It refers, by comparison or mirror-image, to that of the currency, to the capacity that this instrument has to discharge, in a general, common or universal way, the debtor from an obligation.

9. What is the discharging power of cryptocurrencies? Does this discharging power make virtual currency a currency? Is this desirable or possible? As was said, we will first consider whether the current regulation of payment gives cryptocurrencies a power to discharge. Second, more fundamentally, and from a prospective standpoint, we will study whether cryptocurrencies have the capacity to become currencies and what frame it is necessary to provide them with. That is why, to analyse the discharging power of cryptocurrencies, we will present in a first part the state of law *de lege lata* (I) and, in a second part, the characterisation and the treatment they may get *de lege ferenda* (II).

53. *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 276.
54. Article 1342 of the French Civil Code, from *French Civil Code, Code civil français, English-French-Arabic* (n 53): 'Payment is the voluntary execution of a performance that is due. It must be made as soon as the debt becomes demandable. It releases the debtor in regard to the creditor and extinguishes the debt, except when legislation or the contract provided for subrogation into the rights of the creditor.'
55. Article 1626 of the Colombian Civil Code provides that 'El pago efectivo es la prestación de lo que se debe'.
56. On that voluntary feature, M. Julienne, *Régime général des obligations* (4th edn, LGDJ 2022) 362, nº 528. See generally, the explanations on the absence, in the Colombian Civil Code, of any reference to the voluntary nature of payment and on the advantages of that stance, unlike the requirement of voluntary character as provided for in French law: P. Natalia Robles Bacca, 'El cumplimiento de las obligaciones en el contexto de la reforma de 2016 al derecho francés de las obligaciones y su posible pertinencia para orientar futuros cambios en la materia en el ordenamiento colombiano' in A. Riaño Saad and Silvana Fortich (eds), *La reforma francesa del derecho de los contratos y de las obligaciones:¿ fuente de inspiración para una futura reforma en derecho colombiano (*Universidad Externado de Colombia 2020) 588-90.
57. In that sense, Article 1666 of the Colombian Civil Code.

I. *De lege lata*, the state of the law of payment in cryptocurrencies in France and Colombia

10. In French law, *the reform of the law of contract, the regime of obligations and the proof of obligations* performed by the Order of 10 February 2016[58] has modified the system framing the payments of obligations of sums of money,[59] which is found mainly in the Civil Code and in the Monetary and Financial Code. How are cryptocurrencies integrated into that system? Not really well. The use of cryptocurrencies is not easily inserted into the payment mechanism of monetary obligations as regulated in French law. In Colombian law, unlike in French law, there is no specific regulation of monetary obligations – studying those obligations and their regime is done based on a few general provisions of the Commercial Code, others specific to the contract for the loan of money of the Civil Code and some specific provisions in the area of international operations.[60] Here again, the use of cryptocurrencies does not easily integrate into the domain of monetary obligations. However, thanks to some forms of reasoning, and provided that the parties agree, it is possible, in the current state of the law, to perform a conventional payment in cryptocurrencies. Beyond that result – which is the same in French and Colombian law – the observation leads one to wonder about the consequences of a payment in cryptocurrencies. Let us first go back to the possibility of conventional payment in cryptocurrencies (A) before studying the consequences of such payment (B).

A. The possibility of conventional payment in cryptocurrencies

11. Overview of the regulation of payment currency in French and Colombian law – In French law, the issue of payment currency is largely determined by European Union law, in addition to the different domestic texts regulating the payment of monetary obligations. The principle that is expressed in the Treaties of the European Union and the French Monetary and Financial Code as well as the Civil Code is that one should use the euro and the methods of payment regulated by the law to pay an obligation of a sum of money in France.[61] In Colombian law, monetary sovereignty and a few rules on payment would be an obstacle to cryptocurrencies being admitted as a means to extinguish monetary obligations. Parliament, being the holder of monetary sovereignty, which is understood as 'the power of the

58. Order Nº 2016-131 of 10 February 2016 'The law of contract, The general regime of obligations, and proof of obligations, The new provisions of the Code civil created by Ordonnance Nº 2016-131 of 10 February 2016 and including revisions made to the text by Act Nº 2018-287 of 20 April 2018' translated into English by John Cartwright, B. Fauvarque-Cosson and S. Whittaker <https://www.justice.gouv.fr/traduction-lordonnance-du-10-fevrier-2016-langue-anglaise> accessed 26 September 2023.
59. M. Julienne (n 56) 521.
    See also on the modifications introduced by the ratification statute of 20 April 2018, M. Mekki, 'La loi de ratification de l'ordonnance du 10 February 2016, Une réforme de la réforme?' (2018) Recueil Dalloz, 900, nº 36.
60. A. Gámez Rodríguez, *Obligaciones de dinero, intereses y operaciones en criptomonedas* (Temis 2020) 61.
61. Generally, on payment currency in French law, S. Benilsi, 'Paiement' (February 2019 – updated December 2019) Répertoire de droit civil Dalloz; F. Grua, updated by N. Cayrol, 'Vº Paiement, Fasc. 30: Régime général des obligations, Paiement des obligations de somme d'argent, Monnaie de paiement' (2017 – updated 6 July 2022) JurisClasseur Notarial Répertoire.

State to regulate the operation of the currency',[62] is the only competent authority to establish the currency having legal tender in the country. Articles 150 and 371 of the Political Constitution confirm that solution. More specifically, Article 150(13) provides that Congress has the power to 'determine the legal currency, its convertibility and the scope of its power to discharge'.[63] Article 371 provides that the Central Bank of Colombia – *Banco de la República* – is the authority issuing and regulating the legal currency, and Act 31 of 1992 on the functioning standard of the Central Bank, provides, in Article 6, that the monetary unit and unit of account of the country is the peso, issued by that monetary authority. In addition, Article 8 of that law provides that its value is expressed in pesos, in compliance with the Board of the Central Bank, and will be the only methods of payment having legal tender and, consequently, unlimited power to discharge.[64] The rules about payment which would prevent granting cryptocurrencies a power to discharge are to be found mainly in Article 874 of the Colombian Commercial Code. Pursuant to that Act, 'except indication to the contrary, the amounts stipulated in legal transactions will be in Colombian legal currency. The national currency having power to discharge at the moment of payment will be considered as the equivalent of the agreed upon currency, when it is not in circulation when payment is made.' That provision reaffirms the thesis according to which the official currency in circulation is the only one that may be used to perform a discharging payment.[65] Does this mean that only the euro in France or the peso in Colombia, transferred to the creditor by a recognised means, may allow the discharge of a debtor who has bound himself to paying a sum of money? While the rules about payment first seem to oppose the use of cryptocurrencies to pay, it is still necessary to assess the capacity of cryptocurrencies to be used to perform discharging payments. Different questions may be raised given the delineation of the texts providing for the use of a determined payment currency or their interpretation. There are many arguments aiming to allow cryptocurrencies to slip into the corners of the payment-framing system. However, the analysis of those arguments shows that cryptocurrencies may not prevail in payments just like official currencies, but they may only work when the parties agree to use them for payment. In other words, in French and Colombian law, cryptocurrencies do not have a legal power to discharge (1) but may have a conventional one (2).

1. The denial of a legal discharging power

12. Though the denial of the legal discharging power of cryptocurrencies exists in French and Colombian law, the arguments leading to such a conclusion are not necessarily the same in those two legal systems. That is why it is first necessary to present the situation in French law (a) before studying that in Colombian law (b).

62. Corte Constitucional Colombiana, Sentencia C-021 de 1993, M.P.: Ciro Angarita Barón.
63. S. Naranjo Valencia, 'Desafíos jurídicos que implica el pacto de criptomonedas como medio de pago en la celebración de un contrato de compraventa civil. Una mirada desde el neoconstitucionalismo' (2018) Nº 50 Revista de Derecho y Economía, 110.
64. J. Mendoza Gómez, 'criptomonedas' in Y. López Castro, J. Oviedo Albán and M. F. Ávila Cristancho (eds), *Transformaciones del derecho comercial*, (Tirant lo blanch 2021) 410; E. I. León Robayo and Y. Castro López, *Derecho mercantil consuetudinario* (1st edn, Universidad del Rosario Legis 2016) 67.
65. W. Namén Vargas, 'Obligaciones pecuniarias y corrección monetaria' (1998) Nº 3 Revista de Derecho Privado, Universidad Externado de Colombia, 44-45.

a. In French law

13. Legal tender, a doctrinal definition – In French law, the first issue is that of the obstacle of legal tender. Pursuant to the principle derived from European Union law, only euro banknotes and coins have legal tender. Indeed, Article 128 of the Treaty on the Functioning of the European Union provides that '1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union'.[66] What does this rule of legal tender cover? The answer is far from obvious and has led to many debates.[67] Thierry Bonneau has defined it as 'the decision taken by a State to mention that such and such monetary media must be accepted as methods of payment'.[68] On one side, according to a restrictive and usual vision, legal tender is limited to the obligation for the creditor to accept banknotes and coins in euros.[69] The French Penal Code sanctions non-compliance with that requirement – accepting euro banknotes and coins – with a fine provided for in Article R. 642-3.[70] As far as doctrine is concerned, Rémy Libchaber has expressed the idea that legal tender allows the debtor to impose some methods of payment.[71] Jean Carbonnier has defined legal tender, which he links to the principle of the nominal value of money, as 'the law-imposed obligation for a creditor to accept a determined monetary instrument as payment for a determined quantity of monetary units'[72] but he insists on the equivalence between the units used for payment and the units owed.[73] Caroline Kleiner describes legal tender, limited to the sole material media of banknotes and coins, as 'imposing upon the creditor to accept the means of payment presented by the debtor for the amount that is on the monetary denomina-

66. Official Journal of the European Union, 26/10/2012, C326/49.
See also Art. 16 Protocol (N° 4) on the statute of the European System of Central Banks and of the European Central Bank <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT> accessed 1st March 2023. See also Art. L. 122-5 and Art. L. 141-5 of the Monetary and Financial Code; on the texts founding legal tender, C. Kleiner, *La monnaie dans les relations privées internationales*, foreword by P. Mayer (LGDJ 2010) n° 143 and H. de Vauplane, 'Un euro numérique est-il légal?' (2023) N° 149 Revue d'économie financière, 121, esp. 122ff.
67. T. Bonneau, 'The concept of legal tender in France' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 79, generally and especially on the definition difficulties, 80-81. See also on that topic, noting the lack of uniformity of the notion of legal tender, H. de Vauplane, 'Libra, Les défis juridiques du Libra et plus généralement des crypto-monnaies' (2020) N° 1 Revue de Droit bancaire et financier, Study 2, n° 4.
Compare in German law, S. Arnold, 'The Euro in German (private) law – monetary obligations and the mutual dependence of public and private law' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 141, esp. 143-48.
68. T. Bonneau (n 67) 79, esp. 84: 'legal tender is the decision taken by a State mentioning that such and such monetary media must be accepted as methods of payment'.
69. F. Grua, updated by N. Cayrol (n 61) n° 6, presenting the debit card as not having legal tender (ibid n° 7).
70. F. Grua updated by N. Cayrol (n 61) n° 6. See also on that text and noting that the violation of the text – 'the refusal to accept euros' – does not entail the cancellation of the debt, T. Bonneau (n 67) 79, esp. 87.
According to whom that text does not found the obligation to accept paper money but is only designed to protect the face value of coins and banknotes, T. Le Gueut, *Le paiement de l'obligation monétaire en droit privé interne*, foreword by H. Synvet (LGDJ 2016) N° 478 à 481.
See also Art. R 642-2 of the Penal Code.
71. R. Libchaber, *Recherches sur la monnaie en droit privé*, foreword by P. Mayer (LGDJ 1992) n° 89.
72. ibid.
73. J. Carbonnier, *Droit civil 2, Les biens, Les obligations* (PUF 2004) n° 688: 'Legal tender is the affirmation of that equivalence: the law grants legal tender to the monetary instrument for a value (cf a. 642-3 N.C.P.), which is its nominal, facial value (printed on the front of the coin or the banknote).'

tions'.[74] If one follows that strict meaning, the rules about legal tender are not an obstacle to using cryptocurrencies for payment.[75] For the creditor not to be able to refuse euro banknotes and coins is one thing, for him to admit something else as payment is another, which would not be incompatible with the rule of legal tender. However, on another side, another vision, which gives a broader scope to legal tender, is that the rule prohibits payments in other currencies than the euro.[76] That position is sustained by Thomas Le Gueut who, based on a re-delineation of legal tender – which should not be limited only to banknotes and coins, but should include scriptural currency –[77] considers that 'legal tender is also the attribute of a currency – for example the euro – which is the only one to be admitted by law to circulate for payment on a given territory'.[78] According to that conception, legal tender is opposed to the advent and use of cryptocurrencies.

14. Legal tender as defined in case law – One must nonetheless note that despite doctrinal debates, legal tender has recently been defined in a case. The Court of Justice of the European Union gave its understanding of the concept of legal tender[79] when it examined a text forbidding the use of banknotes and coins to pay television licence fees in its decision of 26 January 2021.[80] The Court quoted the definition of legal tender as given in Commission Recommendation 2010/191/EU of 22 March 2010 *on the scope and effects of the legal tender of euro banknotes and coins* which defines it in view of its implications – obligation to accept euro banknotes and coins at their full face value and discharging power –[81] ie considering its functions.[82] According to the Court, the notion of legal tender 'signifies, in its ordinary sense, that that method of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt'.[83] Legal tender would consequently be opposed to the refusal of some methods of payment but would not say anything about the others being accepted. In short, it is not sure that legal tender as such is an obstacle to payment in cryptocurrencies.[84] For, as the quoted texts say, legal tender seems to be limited to an attribute of some monetary media, not to be related to a quality of legal currency.

74. C. Kleiner (n 66) nº 69: '*An outdated notion, legal tender only applies to media having a denomination* (…)', and nº 143. See also T. Bonneau (n 67) 79, esp. 82 according to whom legal tender is useless for scriptural currency which is linked to paper money.
75. Compare with N. Mathey (n 23) nº 18 for whom the lack of legal tender does not entail that the currency is disqualified.
76. S. Benilsi (n 61) nº 163 debating on the meaning of legal tender. Compare with T. Bonneau (n 67) 79, esp. 82.
77. T. Le Gueut (n 70) nº 474 to 477, and nº 483ff.
78. T. Le Gueut (n 70) nº 474 to 477, and Nº 489.
79. *Contra* H. de Vauplane (n 66) 121, esp. 121 for whom that decision does not provide a definition of legal tender, and 133.
80. Joined Cases C-422/19 and C-423/19.2 *Johannes Dietrich and Norbert Häring v Hessischer Rundfunk* (2021); C. Kleiner, Chronique de droit bancaire international (2021) Nº 5 Revue de droit bancaire et financier, nº 1ff.
81. Court of Justice of the European Union, 26 January 2021, n 78, points 8 and 49.
82. C. Kleiner (n 80) nº 1ff, esp. nº 4.
83. Court of Justice of the European Union, 26 January 2021, n 78, point 46. Compare with the definition suggested by Advocate General Giovanni Petruzzella, (Joined Cases C422/19 and C423/19 *Johannes Dietrich* (C422/19) *Norbert Häring* (C423/19) *v Hessischer Rundfunk* [2020] Opinion of AG Pitruzzella, points 108, 116, 124 and 125) on the occasion of that case: 'the concept of legal tender in EU law, as regards banknotes and coins (…) must be understood as entailing in principle the mandatory acceptance of euro banknotes by the creditor of a payment obligation, unless the contracting parties in exercising their contractual freedom have agreed on other means of payment or unless legislation adopted by the European Union or by a Member State'.
84. See also D. Carreau, C. Kleiner (n 23) nº 16.

15. Legal tender, different from power to discharge – In reality, legal tender should be differentiated from power to discharge,[85] which would be more likely linked to the exchange rate of the currency. According to Caroline Kleiner, the power to discharge defined as ‘the capacity for the debtor to be discharged from their monetary obligation through the transfer of a monetary power included into a given medium, issued in a certain unit’ would be linked to the currency rather than to its legal tender.[86] Then, while it is possible that legal tender may be indifferent to the power to discharge of cryptocurrencies, that would not be the case of the legal tender of the currency, which is, for the same author, the rule that sets ‘the legal unit used on a territory’.[87] Having said that, one should note that the media having legal tender have a legal effect to discharge without the creditor having to intervene.[88] From that point of view, legal tender and power to discharge are necessarily linked.[89] However, outside legal tenders, the power to discharge is still possible if the parties agree.[90] In short, granting legal tender – which is a competence of the State –[91] implies the power to discharge of the medium in question, but the absence of legal tender does not oppose any and all discharging effects.

16. The principle of using the euro – Second, payment in cryptocurrencies comes naturally into conflict with provisions framing the payment of obligations of sums of money and requiring that the euro be used. First, the Monetary and Financial Code provides in Article L. 111-1 that ‘The euro is the currency in France. A euro is divided into a hundred cents’. The French Civil Code[92] provides, as to the ‘Dispositions specific to obligations of sums of money’ and at Article 1343-3, that ‘In France payment of an obligation of a sum of money is made in euro.’[93] A strict interpretation of that text is sometimes put forward, which would exclude using another currency and would result in prohibiting any payment in cryptocurrency.[94] Beyond that, different questions are raised as to the delineation of that text and its application to virtual currencies. Some have deduced from the refusal to classify cryptocurrencies as currencies, that payment in cryptocurrencies was not subject to the constraining regime of monetary obligations.[95] Such a reasoning, which is somewhat artificial, may

85. Compare with F. Grua, updated by N. Cayrol (n 61) nº 9 for whom legal tender is an attribute of currency and legal power is for all types of goods. See also D. Carreau, ‘Le système monétaire international privé (UEM et euromarchés) (Volume 274)’ in *Collected Courses of the Hague Academy of International Law*, first online publication: 1998 <http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789041113009_02> accessed 2 June 2023, 309, esp. 357-58 on the classic theory linking legal tender and discharging power. *Contra* M. Julienne, ‘Les crypto-monnaies: régulation et usages’ (2018) Nº 6 Revue de droit bancaire et financier, Study 19, nº 9 according to whom the power to discharge is ‘*the corollary of legal tender which cryptocurrencies lack*’.
86. C. Kleiner (n 66) nº 69. Compare with R. Libchaber (n 71) nº 461 which distinguishes exchange rate, which is decisive to identify the ‘*units that can be given in payment*’ and legal tender, which is related to the accepted media and instruments.
87. ibid.
88. T. Bonneau (n 67) 79, esp. 85.
89. On the link between legal tender and characterisation as a currency, see infra nº 55.
90. T. Bonneau (n 67) 79, esp. 85.
91. ibid 79, esp. 83 according to whom State authorities could grant legal tender to other media, like cryptocurrencies.
92. Compare with the new Belgian Civil Code in which contract law has just been amended by Act of 28 April 2022 and which does not include any rule about currency and payment <https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2022-07-01&caller=list&numac=2022032058> accessed 3 March 2023.
93. *French Civil Code, Code civil français, English-French-Arabic* (n 53) 277. On that regulation generally, T. Bonneau (n 44) nº 745; M. Julienne (n 56) nº 571, 389.
94. M. Julienne (n 85) nº 14.
95. S. Benilsi (n 61) nº 166.

be found surprising insofar as it would allow to liberalise that practice by bypassing the system of monetary obligations, while the purpose of cryptocurrencies is precisely, for their supporters and users, to play the role of a currency. Moreover, Article 1343-3 of the Civil Code applying to payment 'in France',[96] some authors have also thought about the location of payment in cryptocurrencies. If it were not located in France, then Article 1343-3 of the Civil Code would not apply.[97] Here again, such a demonstration would lead to a sort of complacency towards the ambition of the issuers and users of virtual currencies, which is hardly desirable. However, it is true that localising on a national territory some operations performed on the *blockchain* and a possible transfer of cryptocurrencies remains difficult, if not impossible. The structurally transnational character of the uses of the blockchain has been noted[98] as well as the subsequent difficulty of identifying the applicable national law due to the characteristics of the blockchain itself, which cannot be linked to a national territory because of its immaterial and decentralised nature.[99] Subject to these interpretations, which allow to apply Article 1343-3 of the Civil Code to the payments in question, the text would oppose the use of cryptocurrencies for payment. That being said, one must acknowledge that the text provides for exceptions.

17. Exceptions to using the euro – Then, the question is whether cryptocurrencies may be included into the exceptions to using the euro. Article 1343-3 of the Civil Code allows for the possibility to use 'another currency' than the euro, '*if the obligation so denominated arises from an international transaction or from a foreign judgement*'.[100] This text, which provides a basis for admitting foreign currency clauses,[101] does not allow for the possibility of paying in cryptocurrencies with certainty, for, in order to do so, cryptocurrencies should be acknowledged as foreign currencies. However, characterisation as currencies, while sometimes accepted,[102] is widely denied.[103] At least, it has not been granted in French law for the moment. It would be the same within the framework of Article L. 112-5-1 which provides that 'By way of derogation to Paragraph 1 of Article 1343-3 of the Civil Code, satisfaction may be rendered in another currency provided the obligation providing for it proceeds from a financial futures instrument or a spot currency transaction'.[104]

96. D. Carreau, C. Kleiner (n 23) nº 127 highlighting that that French legal choice is an isolated one.
97. S. Benilsi (n 61) nº 166.
98. M. Audit (n 2) 672, as well as footnotes, and 682 on payment in cryptocurrencies. See also An. d'Ornano (n 16) 180, who makes the same observation.
99. In particular M. Audit (n 2) 677-78 and 684.
100. The same text (Art. 1343-3(2) Civil Code) goes on as follows: 'The parties may agree that payment will be made in a currency if it takes place between professionals, if the use of a foreign currency is commonly accepted for the transaction in question' (from *French Civil Code, Code civil français, English-French-Arabic* (n 53) 277).
101. On that issue, S. Benilsi (n 61) nº 140ff.
102. N. Mathey (n 23) nº 10ff, nº 34 and nº 35 calling them 'embryonic, in the making, or imperfect'.
103. On the denial to grant them foreign currency status, M. Audit (n 2) 683; S. Benilsi (n 61) nº 166. See also, refusing to grant them currency status, esp. M. Julienne (n 85) nº 9ff; T. Bonneau, T. Verbiest (n 40) 65; C. Pommier, V. Mamelli, A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 2 – Les qualifications, Chapitre 1 – Les éléments du débat' in *Rapport du 117e Congrès des notaires de France*, 2021, Nº 2-55ff <https://rapport-congresdesnotaires.fr/2021-co2-p1-t2-st2-c1/#> accessed 4 March 2023. See also Statement of François Villeroy de Galhau, Gouvernor of the Banque de France, Beijing 1st December 2017 on Bitcoin: '(…) Bitcoin has nothing to do with a currency or even a cryptocurrency'.
104. M. Audit (n 2) 683, fn 65.

18. The system framing payment instruments – Third, the issue of the regulation of payment instruments arises. Could operators provide payment services, which until now have been reserved for banking or payment institutions?[105] Leaving fiduciary currency aside, scriptural currency needs the intervention of payment instruments to circulate.[106] In the case of cryptocurrencies, it is the purpose of the blockchain. Bitcoin would allow the circulation of cryptocurrencies 'in a decentralised and perfectly secure manner'.[107] In other words, the aim is for Bitcoin to become a currency and, in addition, to efficiently ensure the means of its circulation. *Ripple* is even directly conceived as a payment system.[108] That function, as such, raises delicate issues. That those processes comply with the *corpus* of norms regulating payment services and instruments is not obvious. It has been showed that the characterisation of payment instruments according to the European Union did not include Bitcoin because it lacks a means of transfer of a scriptural currency.[109] Does this mean however that the provision of payment instruments by the blockchain could remain without framework? That is far from sure. Once again, the disqualification of virtual currencies, as founded as it is, leads to the opening of a space of freedom the relevance of which needs to be assessed[110] and which may, if need be, entail a modification of the existing legislation.[111] Beyond that, one should note that the *Cour d'appel de Paris* and the *Autorité de Contrôle et Prudentiel et de Résolution* have subjected the companies allowing to buy cryptocurrencies with legal currencies to the regulation of payment services imposing an authorisation.[112] Moreover, the systems imposing some payment methods may already oppose the use of cryptocurrencies. Admittedly, the issue is a delicate one in relation to the texts which oppose the use of some methods of payment, which, if interpreted literally, would leave a possible space for cryptocurrencies. That is the case of Article L. 112-6 of the Monetary and Financial Code, amended by Act N° 2016-1691 of 9 December 2016 *on the transparency, fight against corruption and modernisation of economic life* which indeed prohibits payments in cash and digital payments of some debts in view of a combination of their amount and other criteria – from a perspective of fighting against money laundering and the financing of terrorism.[113] Not being cash or electronic money, cryptocurrencies may not be subject to Article L. 112-6 of the Monetary and Financial Code,[114] which should make an adaptation of the text necessary. On the contrary, there remains that, without hesitation, when the law imposes a determined payment instrument, as in Article L. 112-6-1 of the

105. T. Bonneau (n 44) n° 94.
106. R. Libchaber (n 71) n° 116ff and n° 484.
107. P. De Filippi (n 2) 4.
108. D. Legeais (n 15) n° 42; P. de Filippi (n 2) 42.
109. T. Bonneau (n 33) 1011. *Contra* N. Mathey (n 23) n° 39 and 42.
110. T. Bonneau (n 44) n° 94.
111. Compare with T. Bonneau (n 33) 1013 for whom States could accept new payment instruments by adapting existing texts to include virtual currencies, without granting those privately-created virtual currencies currency status.
112. M. Julienne (n 85) n° 10-1; T. Bonneau, T. Verbiest (n 40) 65. See also on that topic, F. Drummond, 'Bitcoin: Du service de paiement au service financier? (2014) N° 5 Bulletin Joly Bourse, 249. Compare with A. d'Ornano (n 16) 180, noting that the Libra Association was called payment service providers in Switzerland. See the release of FINMA, the Financial Market Supervisory Authority, of 11 September 2019 <https://www.finma.ch/fr/news/2019/09/20190911-mm-stable-coins/> accessed 3 March 2023– requiring Libra to obtain authorisation 'as a payment system', on the condition that the Libra Association, and not the holders of funds, 'bears all the gains and risks linked to its management of reserves'. That application for authorisation was made by Libra and then withdrawn <https://www.finma.ch/fr/news/2021/05/20210512-mm-diem/> accessed 3 March 2023.
113. S. Benilsi (n 61) n° 114.
114. *Contra* M. Julienne (n 85) n° 13.

Monetary and Financial Code, cryptocurrencies cannot be allowed. Then, from that perspective, the rule that is written in a way to provide a limited list of methods of payment is more efficient, or at least has the advantages of a secure solution.[115] Again, those are considerations which should induce the amendment of our texts which are ill-adapted to the reality that virtual currencies could form.

19. In short, the payment of monetary obligations in cryptocurrencies is not naturally welcome in French payment law. Cryptocurrencies are being tossed about between lack of admission and lack of prohibition.[116] What can be deduced from such unsuitability of payment law? *A minima*, that cryptocurrencies do not have legal discharging power.[117] The arguments that have been developed in Colombian law should be analysed to lead to the same conclusion.

b. In Colombian law

20. The administrative authorities' refusal to grant cryptocurrencies monetary status – Even if cryptocurrencies are not regulated, many administrative authorities have decided, especially via concepts,[118] to refuse to grant cryptocurrencies monetary status, by invoking, above all, the principle of monetary sovereignty and the rule of using the peso to pay monetary obligations. That is the case of the Central Bank, of the Financial Superintendence,[119] of the National Tax and Customs Department (NTCD), of the Superintendence of Companies[120] and of the Technical Council of the Public Accountancy.

The Central Bank Concept Q16-584 of 10 February 2016,[121] issued by the Board, should be highlighted. In that concept, the Bank asserted that the currency unit and unit of account in Colombia was the peso issued by the Bank of the Republic. Consequently, the Colombian peso is the only method of payment having legal tender and unlimited discharging power to extinguish obligations. Similarly, that authority noted that in Colombia, the so-called 'virtual currencies' are not admitted by the legislator and the monetary authority as being currencies. Lastly, the Central Bank underlined the lack of support of the State for that type of currency and the fact that they are outside a centralised, controlled or monitored system.

Following on that concept, that organ issued a press release on 1 April 2014 on virtual currencies, especially Bitcoin. On that occasion, the Bank insisted on the fact that the only

115. See also Art. L. 112-8 of the Monetary and Financial Code.

116. Compare with the countries forbidding Bitcoin mentioned in D. Carreau, C. Kleiner (n 23) nº 15.

117. Compare with the definition of legal power to discharge and the different degrees of discharging power highlighted by B. Courbis, 'Comment l'État confère la qualité de monétaire à un avoir? De la notion de cours à la notion de pouvoir libératoire légal' in P. Kahn (ed), *Droit et monnaie, État et espace monétaire transnational* (Litec 1988) 33, esp. 44ff. See also that analysis reproduced in T. Le Gueut (n 70) nº 491ff.

118. Generally, a 'concept' according to Colombian case law is a sort of direction, point of view or piece of advice given by the administration in response to a right to petition (Art. 13 of the Administrative Procedure and Administrative Disputes Code (APADC)) which has a pedagogical function and a function of fluid and transparent communication. Similarly, it is specified that its aim is to establish the interpretation of legal precepts to facilitate the issuance and execution of administrative tasks and to serve as a guide for citizens as to the actions expected by the administration. Thus, a 'concept' is not constraining: Corte Constitucional Colombiana, Sentencia C-542 de 2005, 24 May 2005, M.P.: H. A. Sierra Porto. Some seem to consider that as so-called 'soft law': M. Federico Bustos Romero, 'El *soft law* como fuente del derecho administrativo colombiano (2019) Vol. 22 (44) Revista Prolegómenos, 35-48.

119. The Financial Superintendence is an institution monitoring and controlling the Colombian financial system: see Decrees 2739 of 1991 and 4327 of 2005 on the general functions of that body.

120. The Superintendence of Companies is an institution which monitors and controls the different companies of the country: see Decrees 1736 of 2020 and 1380 of 2021 on the general functions of that body.

121. That concept is available at <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/q16-584> accessed 10 December 2022.

currency and account unit in Colombia was the peso (banknotes and coins) issued by the Bank of the Republic and that Bitcoin is not a currency in Colombia. Thus, there is no obligation to accept it as a method of payment.[122]

The Colombian Financial Superintendence has also had the opportunity to give its opinion on cryptocurrencies several times. For example, it issued Memoranda Nº 29 of 26 March 2014,[123] 78 of 16 November 2016[124] and 52 of 22 June 2017,[125] which were addressed to legal representatives, members of boards and external auditors of the monitored entities, to remind them that they are not allowed to keep, invest, operate or intermediate with cryptocurrencies, nor to allow that their platforms be used for operations in cryptocurrencies. For the Financial Superintendence, it is not even possible to assert that virtual currencies, such as Bitcoin, have a value pursuant to Act 964 of 2005 governing the stock market. It also insisted on the fact that, cryptocurrencies lacking an unlimited discharging power, a creditor could not be forced to accept them as payment.

The National Tax and Customs Department (NTCD) also issued many concepts to answer consultations on cryptocurrencies. Among the most important ones, one should underline Concepts 035238 and 001357 of 2018[126] where this authority reasserted that crypto-assets are not an admitted currency and that consequently they have no unlimited discharging power.

The Superintendence of Companies denies the possibility of accepting that a contribution in cryptocurrencies to a company may be considered as a cash contribution,[127] precisely because of the reluctance to consider that cryptocurrencies are currencies. One should even underline that, even though it is no longer true today,[128] that entity had shown some reluctance about the possibility to use cryptocurrencies for any type of contribution. Its position was supported by a supposed prohibition to use cryptocurrencies.[129]

Lastly, the Technical Council of the Public Accountancy also issued several concepts about the accounting treatment of cryptocurrencies, among which the last two should be underlined,[130] where it reasserted the positions of the above-mentioned authorities, to refuse to call cryptocurrencies currencies and therefore the impossibility to accept that they are legal tender.

122. That press release is available at <https://www.banrep.gov.co/es/comunicado-01-04-2014> accessed 5 December 2022.
123. That circular is available at <https://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_29_14.pdf> accessed 10 January 2023.
124. That circular is available at <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_78_16.pdf> accessed 10 January 2023.
125. That circular is available at <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 10 January 2023.
126. Those documents are available at <https://www.dian.gov.co/normatividad/Documents/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 15 January 2023.
127. Oficio 100-237890 of 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023.
128. We will come back to that aspect: infra nº 30.
129. Oficio 220-196196 of 30 September 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+220-196196+DE+2020.pdf/725c1f11-2f2e-caa4-e470-6f0fffc07d62?version=1.3&t=1670899424658> accessed 16 January 2023.
130. Concepto 2017-977 <https://cdn.actualicese.com/normatividad/2017/Conceptos/C977-17.pdf> accessed 15 January 2023; Concepto 2018-472 <https://www.ctcp.gov.co/CTCP/media/ctcp-media/documentos/DOCr-CTCP-1-8-12381.pdf> accessed 15 January 2023.

Apparently therefore, the Colombian administrative authorities, without openly acknowledging it, consider that the discharging power results from legal tender, which cryptocurrencies lack, which stance is similar to that of part of the French doctrine.[131] As to the scope of legal tender, it seems that a strict meaning is favoured:[132] the authorities insist on the impossibility to force the creditor to accept cryptocurrencies, unlike a payment in pesos where the creditor cannot refuse the banknotes and coins tendered by the debtor.

21. Cryptocurrencies are not a foreign currency – Though there is no doubt as to the reluctance to consider that cryptocurrencies are currencies, one could still wonder whether they may be foreign currencies. If they are, then they have a power to discharge, at least for some international operations,[133] pursuant to what is provided in Article 874(2) of the Colombian Commercial Code in compliance with External Resolution No. 1 of 2018.[134] Pursuant to that paragraph, 'obligations that have been denominated in foreign currencies will be covered by the stipulated currency(ies) if that is legally possible; if not, they will be paid in Colombian national currency, in compliance with the legal requirements in force at the time of payment'. The legislator therefore recognises the possibility to pay in foreign currencies provided those are operations belonging to the exchange rate regime.[135] The Central Bank has nevertheless decided against the possibility to consider Bitcoin as a currency that may be involved in exchange operations; the lack of any support from central banks from other countries may explain that denial.[136]

22. Practical issues against recognising that cryptocurrencies are currencies – Three important practical arguments are often put forward, by authors[137] as well as administrative

131. supra n° 13ff.
132. supra n° 13.
133. That type of operation is provided for in Articles 4 of Act 9 de 1991 and 2.17.1.1. of Decree 1068 of 2015. For example, importing and exporting goods and services, investing foreign capitals in the country; Colombian investments abroad.
134. When the concept was issued by the Central Bank, the exchange rate regime was governed by Resolution Externa N°. 8 of 2000 of the Governing Council of the Central Bank.
135. J. Mendoza Gomez (n 64) 411.
136. Concepto Q16-584 of 10 February 2016 <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/q16-584> accessed 20 December 2022. See also A. Contreras P, 'Validez contractual de las transacciones realizadas en criptomonedas', 9 May 2019 <https://derinformatico.uexternado.edu.co/validez-contractual-de-las-transacciones-realizadas-con-criptomonedas/> accessed 7 December 2022.
137. A. Ayala Aristizábal, 'Naturaleza jurídica de las criptomonedas a la luz de los pronunciamientos de soft law en Colombia (2021) vol. 20 N° 1 Revista Jurídica Piélagus; Carlos Arango-Arango, María Barrera-Rego, et alii., 'Criptomonedas', informe técnico, Banco de la República <https://www.banrep.gov.co/sites/default/files/publicaciones/archivos/documento-tecnico-criptomonedas.pdf> accessed 20 January 2023.

authorities[138] and even judicial ones,[139] to underline the drawbacks linked to using cryptocurrencies and deny they have legal discharging power.

The first is related to the financing of terrorism resulting from the anonymity of those operations. The second is about the fear of supporting money laundering which could be encouraged or at least facilitated by the use of cryptocurrencies. Lastly, there is the risk linked to the volatility proper to cryptocurrencies which would render their function as account units and stores of value, which are characteristics of legal tender, difficult.[140]

That explains, for example, Resolution 314 of 2021,[141] which consecrates the obligation, which applies to any legal and natural person who provides virtual-asset services in Colombia,[142] to inform the Information and Financial Analysis Unit (IFAU) of any transaction involving virtual assets above some amounts established in the regulation.

23. Finally, French law and Colombian law do not grant cryptocurrencies any discharging power. That denial seems to be mainly founded on legal tender. However, the notion of legal tender is not unanimous: while, for some, legal tender would prevent the creditor from refusing some payment instruments, for others, legal tender would be the attribute of a currency that would be the only one in circulation on a territory. Admittedly, legal tender is an attribute of some payment instruments, which are cash (banknotes and coins) while there are other means of payment which are not cash but still allow to circulate scriptural currency, such as bank transfers or cards. The unlimited and legal discharging power may be linked to legal tender: insofar as there are payment methods that the creditor may not refuse, those means of payment have unlimited power to discharge. Cryptocurrencies, which are not considered to be currencies, are not legal tender so that they do not have a legal and unlimited discharging power.[143] However, does this mean that they may not be a

138. Superintendence of Companies, Oficio 220-196196 of 30 September 2020 <https://www.incp.org.co/Site/publicaciones/info/archivos/Oficio-220-196196-de-2020.pdf> accessed 15 January 2023; Financial Superintendence, Circular 52 of 2017 <http://www.nuevalegislacion.com/files/susc/cdj/conc/ccirc_sf_52_17.pdf> accessed 8 December 2022.
139. See in that sense the decision of the Colombian Council of State in a nullity appeal for false statement of reasons against two circulars issued by the Financial Superintendence. One of the arguments of the party was that there was no solid proof demonstrating the risks decried by the Financial Superintendence to justify the issuance of those circulars. The Council of State decided for the Financial Superintendence and affirmed that the risks when using cryptocurrencies were real, which justified the issuance of the administrative act, reminded the monitored entities that they were not allowed to conduct operations in cryptocurrencies as the latter were not granted currency status. It also insisted on the fact that anonymity, which is characteristic of cryptocurrencies, increased the risk of terrorist financing and money laundering denounced by the Financial Superintendence, which was firm ground to repeat the prohibition for institutions under its monitoring and control to use cryptocurrencies: Consejo de Estado, Sala de lo Contencioso Administrativo, Sec. 4., Rad. 1101-03-27-000-2018-00030-00, 15 September 2022, C.P.: M. Stella Gutiérrez.
140. A. Gámez Rodríguez (n 60) 206.
141. That regulation is available at <https://www.uiaf.gov.co/sites/default/files/2022-06/documentos/archivos-anexos/Resoluci%C3%B3n_314_de_2021_AV.pdf> accessed 8 February 2023.
142. Pursuant to Art. 17 of that resolution (supra n 141), and based on the definition of the FATF <https://www.fatf-gafi.org/en/topics/virtual-assets.html> accessed 11 October 2023, a virtual asset is 'any digital representation of value that can be digitally traded, transferred or used for payment. It does not include digital representation of fiat currencies'.
143. For comparison with English law, C. Hare, '9. Cryptocurrencies and banking law: are there lessons to learn?' in D. Fox and S. Green (eds), *Cryptocurrencies in public and private law* (OUP 2019) 229, esp. nº 9.25 and footnote 151, 252: '(…) it is necessary to enquire as to whether payment by cryptocurrency would constitute absolute or conditional payment. Given that most modern payment systems result in the absolute discharge of the underlying debt, as in the case of credit cards (151), it is submitted that it is the more appropriate analogy for cryptocurrencies, rather than linking them to cheques.'

method of payment[144] and cannot be granted conventional discharging power? The answer is no: they may, in French and Colombian law.

2. The acceptance of conventional discharging power

24. In French and Colombian law, cryptocurrencies may be used as methods of payment. However, the above-mentioned reasons in each law are not exactly the same. Thus, it is necessary to study the motives that may be put forward in French law (a) and Colombian law (b).

a. In French law

25. Use of cryptocurrencies and conventional and indirect discharging power – The occasional use of 'special monetary instruments' instead of legal currency has already been highlighted by Remy Libchaber especially about phone tokens, luncheon vouchers, or credit notes.[145] The author has revealed the inherent lack of discharging power of those instruments which only work subject to some constraints – from a payment made in legal tender or in a limited circuit – and therefore their conventional-only power to discharge.[146] Given the present state of practice, the situation could be the same for cryptocurrencies. It is possible to find the characteristics of those alternative monetary instruments in the attempts to use cryptocurrencies in daily operations. Indeed, during the summer of 2022, a Parisian shopping centre communicated its acceptance of cryptocurrencies as a method of payment. Admittedly, upon looking at it more closely, it is only to buy gift cards in euros with cryptocurrencies[147] and therefore pay in euros. However, once again, a power to discharge could be attached to cryptocurrencies even if it were only indirect and necessarily conventional. Beyond that practice, which is restrictive and far from the ambitions of the issuers of cryptocurrencies, it is possible to wonder whether there is a conventional discharging power; in other words whether it is possible, more generally, for parties in a contractual relationship to accept payment in cryptocurrencies.

26. The doctrinal admission of a conventional power to discharge – This idea has not won unanimous support, but some authors accept it. That is the case of Nicolas Mathey, who admits that cryptocurrencies may be 'conventionally granted' a discharging power.[148] Other authors, without giving it a discharging power, acknowledge that it may be a conventional method of payment.[149] That analysis has been recognised in case law.

144. Compare with H. de Vauplane (n 2) n° 2 noting that a private currency, though it does not have discharging power, may be used for payment.
145. R. Libchaber (n 71) n° 111ff.
146. ibid (n 71) n° 111ff and esp. N° 113: 'The appearance of that monetary functioning is only due to a contract which substitutes instruments for the currency'.
147. E Confrere, 'Beaugrenelle, premier centre commercial français à accepter les paiements en crypto-monnaies ce mercredi', Le Figaro, 07/06/2022 <https://www.lefigaro.fr/secteur/high-tech/un-premier-centre-commercial-francais-accepte-les-paiements-en-crypto-monnaies-20220607> accessed 2 March 2023. In the fall of 2019, a company had already offered an application that could transform Bitcoin into means of payment in some stores on the French territory: cf esp. Le Figaro and AFP, 24-25 September 2019, 'Des 2020, plus de 25 000 points de vente en France pourraient accepter les crypto-monnaie <https://www.lefigaro.fr/flash-eco/des-2020-plus-de-25-000-points-de-vente-en-france-accepteront-les-crypto-monnaies-20190924> accessed 2 March 2023.
148. N. Mathey (n 23) n° 18.
149. D. Carreau, C. Kleiner (n 23) n° 16.

27. The recognition of a 'conventional' power to discharge in case law – Giving credence to that last line of understanding, European judges have admitted that a virtual currency may be considered as a method of payment. Indeed, in a litigation about the application of European texts about taxes on added value, the Court of Justice of the European Union granted Bitcoin the quality of 'direct means of payment between the operators that accept it'.[150] Should one consider that decision with prudence, if only because it could only apply in the case in question – the tax issue in the decision issued by the Court of Justice of the European Union in 2015 –[151] and for the given virtual currency? Definitely. That being said, the admission of payment in cryptocurrencies, when contractors want it, seems to be established.[152]

b. In Colombian law

28. The role of practice in the admission of a power to discharge of cryptocurrencies – As in French law, one may wonder whether the repeated and generalised practice of using cryptocurrencies instead of legal tender should lead to the admission that they have a power to discharge, if not equal to that of legal currencies, at least in a conventional way, since the parties may consent to accept them as methods of payment.[153] Colombia is supposedly the tenth country with the most transactions in cryptocurrencies worldwide,[154] and there is an increasing number of shops which accept Bitcoin and other cryptocurrencies by way of payment.[155] Some authors have even mentioned the possibility of admitting, at a time when the lawfulness of using cryptocurrencies was being questioned, the customary character of payment in cryptocurrencies and its being destined to become the rule.[156]

29. The favourable position of the doctrine based on the recognition that cryptocurrencies are 'goods' – For an important part of the doctrine, understanding cryptocurrencies as being goods sharing important characteristics with currencies may explain their power to discharge. Indeed, those authors define a cryptocurrency as 'a digital unit created to be used as a method of payment for the provision of goods and services the nature of which is characterised by the fact that they are an electronic intangible supported by the decentralised encrypted ledger technology (Distributed Ledger Technology), or blockchain'.[157] Other stress that they are transferable, non-tangible fungible digital documents, which may

150. Case C-264/14 *Skatteverket v David Hedqvist* [2015], point 42: specifying that 'The "bitcoin" virtual currency, being a contractual means of payment (…)' and point 50. On that topic, T. Bonneau (n 33) 1009 and 1010, and T. Bonneau, 'Analyse critique de la contribution de la CJUE à l'ascension juridique du Bitcoin' in *Liber Amicorum Blanche Sousi, L'Europe bancaire, financière et monétaire,* Revue Banque, 2016, 295.
151. T. Bonneau (n 150).
152. M. Audit (n 2) 685.
153. P. Sanz Bayón (n 47) 340.
154. <https://www.semana.com/economia/inversionistas/articulo/como-le-va-actualmente-a-las-cripto-monedas-en-colombia/202327/> accessed 13 March 2023.
155. <https://www.elespectador.com/economia/el-Bitcoin-es-cada-vez-mas-aceptado-en-colombia-pero-le-falta-terreno-por-ganar/> accessed 13 March 2023.
156. E I. León Robayo and Y. Castro López, 'La costumbre mercantil en aplicaciones móviles y otros avances tecnológicos contemporáneos', La costumbre mercantil, un aporte para los negocios de los empresarios en Colombia, Confecámaras, Cámara de Comercio de Bogotá, 73 <https://bibliotecadigital.ccb.org.co/bitstream/handle/11520/19941/Publicaci%C3%B3n%20La%20costumbre%20mercantil%20un%20aporte%20para%20los%20negocios%20de%20los%20empresarios.pdf?sequence=1&isAllowed=y> accessed 13 March 2023.
157. M. Alonso Jiménez, n 26.

be consumed from a legal point of view and which may have an economic and lawful value.[158] Some do not hesitate to underline that cryptocurrencies are 'movable and fungible'.[159]

Independently of differences in the authors' approaches, some highlight that cryptocurrencies have, at least from a functional point of view, the characteristics of a currency: they are fungible goods that are consumable from a legal point of view, and divisible, serving as a means of exchange, account unit and store of value.[160] The obstacle to their being granted currency status would lie in the lack of State recognition. However, other authors underline that the volatility of cryptocurrencies questions the possibility to consider them as a means of exchange. Similarly, the possibility to use it as a store of value is debatable. Bitcoin fall in value over the past years, for example, and the lack of reliable data on that phenomenon support such a conclusion. Lastly, it would be difficult to set prices in cryptocurrencies precisely because of their volatility.[161]

30. The favourable position of administrative authorities based on the recognition that cryptocurrencies are 'goods' – A few administrative authorities, like the Superintendence of Companies or the NTDC, refer to cryptocurrencies as either intangible or immaterial goods that could be valued[162] or as digital assets.[163] This is not insignificant insofar as it is precisely thanks to that characterisation that, for example, the Superintendence of Companies now admits the possibility of making a contribution to a company in cryptocurrencies.[164] Admittedly it would not be a monetary but an in-kind contribution, an issue we will come back to when we analyse the consequences of the possibility of paying in cryptocurrencies.[165] However, the fact that they may be the object of a contribution shows that there is some support for their being recognised as objects of obligations.

158. A. Gámez Rodríguez (n 60) 216. Other authors note that cryptocurrencies are movables and fungible things: J. Mendoza Gómez (n 64) 413.
159. J. Mendoza Gómez, ibid.
160. See, on the general characteristics of currency: A. Gámez Rodríguez (n 60) 5.
161. S. Vásquez Rodríguez, *El escenario normativo tras la irrupción de las criptomonedas en Colombia*, monografía de grado, Facultad de jurisprudencia, Universidad del Rosario, 60 <https://repository.urosario.edu.co/server/api/core/bitstreams/8b030383-2a3b-4cb3-a698-7860bb368a1e/content> accessed 13 February 2023.
162. See in that sense the stance of the Colombian Customs and Income Tax Office (CITO) in its answers to consultations Oficios 20436 2 August 2017 and 000314 7 March 2018 <file:///D:/criptomonedas/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 8 November 2022. In the same sense the Superintendence of Companies: see Oficio 220-196196 of 30 September 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+220-196196+DE+2020.pdf/725c1f11-2f2e-caa4-e470-6f0fffc07d62?version=1.3&t=1670899424658> accessed 16 January 2023. See A. Gámez Rodríguez (n 60) 229.
163. A. Ayala Aristizábal (n 137) who defines financial assets as a 'broad concept which includes data, information and intellectual property stored or transferred via electronic devices (…) A great number of financial assets belong to that category of digital assets, like email accounts, digital pictures, online app accounts, social media, e-commerce, and of course, electronic money like cryptocurrencies'.
164. Superintendence of Companies, Oficio 100-237890 of 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023. See on the evolution of the position of the Superintendence of Companies on the topic and on the risks of contributions in crypto-assets to commercial companies: Sebastián Béndiksen and Juliana Caicedo Rozo, 'Operaciones con criptoactivos en Sociedades Comerciales y la Responsabilidad de los Administradores', Revista Foro de Derecho Mercantil, Nº 77, 2022 <https://amchamcolombia.co/wp-content/uploads/2022/10/2022-10-27-BENDIKSENLAW.-Articulo-Revista-Foro-de-Derecho-Mercantil.pdf> accessed 18 January 2023.
165. infra nº 33ff.

Among the many concepts on the subject issued by the Technical Council of the Public Accountancy in Colombia, two should be underlined. In the first,[166] that authority asserted that a cryptocurrency is a financial asset. In a more recent concept,[167] the Council came back on its position and sustained that, based on the Colombian legislation and the points of view of different authorities, as well as the International Financial Reporting Standards (IFRS), the most adequate though approximate characterisation of cryptocurrencies is that of intangible assets, despite the difficulty of including them into financial statements. The Technical Council of the Accountancy asserts that, today, there is no category of assets that is absolutely appropriate to virtual assets. That change in position complies with the fact, based on the precisions given by the Technical Council, that whoever has a financial asset has a contractual right to receive money or another financial asset from another entity, or to exchange financial assets or liabilities with another entity in potentially favourable conditions for the holder of the asset. The Technical Council of the Accountancy considers that there is no certainty that the holder of a cryptocurrency has such a contractual right.

31. The lawfulness of operations in cryptocurrencies. – Thus, insofar as there is no prohibition, in Colombian law, to use cryptocurrencies, the latter may in effect be the object of obligations as immaterial goods having a virtual existence,[168] regardless of the difficulties, for example, surrounding their tax count or even their seizability.[169] Admittedly, administrative authorities and even the Council of State deny them the monetary characterisation of currencies, but none asserts today that using cryptocurrencies is forbidden, except to conduct operations in cryptocurrencies for banks and financial institutions under the supervision of the Financial Superintendence, which precisely results from their not being accepted as currencies.[170] It is therefore possible to note that using cryptocurrencies is admitted, and, consequently, paying with them is perfectly conceivable.

32. Conclusion in French and Colombian law – One may see in it that payment in cryptocurrencies is admitted in French and Colombian law when the parties agree.[171] Accepting payment in cryptocurrencies is likely to entail a series of legal consequences. Without being exhaustive, we are going to examine a few of them.

166. Concepto 2017-977 <https://cdn.actualicese.com/normatividad/2017/Conceptos/C977-17.pdf> accessed 15 January 2023.

167. Concepto 2018-472 <https://www.ctcp.gov.co/CTCP/media/ctcp-media/documentos/DOCr-CTCP-1-8-12381.pdf> accessed 15 January 2023.

168. That is one of the reasons given by the Superintendence of Companies to admit the possibility of a contribution in crypto-assets: Oficio 100-237890 14 December 2020 <https://www.supersociedades.gov.co/documents/107391/159040/OFICIO+100-237890+DE+2020.pdf/1f62977e-47d3-e461-9cc2-484514820fea?version=1.2&t=1670899321635> accessed 15 January 2023.

169. A Gámez Rodríguez (n 60) 25ff. See also on the risk of fraud in insolvency proceedings the case in which the debtor's estate is mainly composed of crypto-assets: J. F. Sicard Arenas, 'Criptoactivos como mecanismo defraudatorio de los acreedores en el proceso de liquidación judicial. Una proposición normativa' (2023) Nº 1 v. 22 Revist@ e-mercatoria, 115-50.

170. Financial Superintendence, Concepto 2017008234-001 of 23 February 2017 <https://www.superfinanciera.gov.co/jsp/10088542> accessed 15 March 2023.

171. M. Audit (n 2) 685.

B. The consequences of admitting payment in cryptocurrencies

33. Three series of questions may be raised as to the consequences of the admission of payment in cryptocurrencies. They result from the fact that two main situations may be distinguished, which at the same time raises characterisation and regime issues: the hypothesis of the obligation denominated in cryptocurrencies (1) and that of the obligation issued in legal tender but paid in cryptocurrency. One should also add the issue of the proof of payment in cryptocurrencies (3).

1. The hypothesis of the obligation denominated in cryptocurrencies

34. Issues – If cryptocurrencies are accepted as conventional methods of payment, the hypothesis of an obligation issued in cryptocurrencies must be assessed with all its implications. The stipulation of such an obligation is not without consequences especially on the characterisation of the contract where it is integrated and therefore on the regime that applies. The question, among others, is whether it is possible to foresee that the price of a sale will be paid in cryptocurrencies, and with what consequences. Let us examine those issues first in Colombian (a) and then in French (b) law.

a. In Colombian law

35. The impossibility to replace a monetary obligation by an obligation to give cryptocurrencies – If cryptocurrencies are not considered currencies, it is difficult to admit that parties may stipulate an obligation to give cryptocurrencies as they would stipulate a monetary obligation.[172] In other words, it does not seem possible today to substitute an obligation to give cryptocurrencies for a monetary obligation.

36. Characterisation of the obligation – Given that they are goods, cryptocurrencies may be the objects of obligations to give. It is an obligation to transfer the ownership of a fungible good in compliance with the above-mentioned characteristics.[173] Thus, the parties will have to determine the quality and quantity, that is, the type and quantity of cryptocurrencies that are the object of the obligation.

Similarly, the debtor having such an obligation will have to bear the risk of a potential loss of cryptocurrencies. They may not invoke, in order to claim for exemption, that they are not the holder of the cryptocurrencies meant for payment.[174]

Lastly, the characterisation of cryptocurrencies as fungible goods leads to assert, pursuant to Articles 1566 and 2223 of the Colombian Civil Code,[175] that the creditor will assume the risks of a rise or a drop in the value of cryptocurrencies. However, because of the volatility of cryptocurrencies, whether the parties wanted to conclude a commutative or random contract should be determined. The question is not insignificant. The important fluctuations of cryptocurrencies explain why some authors have raised that issue. Thus, as

172. A. Gámez Rodríguez (n 60) 237.
173. supra nº 29.
174. In that sense Articles 1729 and 1567 of the Colombian Civil Code.
175. A. Gámez Rodríguez (n 60) 233.

some Chilean authors have underlined,[176] even if the rule should be that the contract should be commutative when it is about cryptocurrencies – especially contracts with instantaneous execution – the solution would be different in the case of a contract involving sequential performance in which the parties have stipulated, for example, that the quantity of cryptocurrencies owed is subject to the value, on payment day, of a currency having legal tender or of a foreign one. Such a clause would show that the intention of the parties was to have an up-to-date value of cryptocurrencies.[177] On the contrary, if the parties have set the quantity of cryptocurrencies in a fixed and unchangeable way, then the contract would be random insofar as the party who is to receive the cryptocurrencies in exchange for a price, for example, accepts the risk that the value of the cryptocurrencies may increase or decrease.

37. Regime of the obligation – Lastly, given that cryptocurrencies do not have currency status, one should conclude, as one author has,[178] that it is useless to apply the regime of monetary obligations – and especially the principles of nominalism and valorism – to obligations relating to cryptocurrencies. They are principles linked to the monetary and exchange policy of a State aiming to answer a difficulty proper to monetary obligations – the natural destiny of their alteration between their birth and their payment. Admittedly, one could think that, precisely because of the fluctuations of the cryptocurrencies value, the application of those principles would be relevant. However, that special feature could have consequences when analysing the legal – commutative or random – nature of the contract the subject matter of which is cryptocurrencies.[179]

38. The forced execution of the obligation denominated in cryptocurrencies – Another issue, linked to the recovery of an obligation denominated in cryptocurrencies, is related to its forced execution. Given that it is impossible to know the real ownership of any and all cryptocurrencies, and the fact that only people knowing the private key to the address that contains them (public key) can use them, it will be difficult for the judge to establish whether the debtor possesses cryptocurrencies for purposes of seizure or sequestration.[180] That way, under such a hypothesis, equivalent enforcement should be sought under the terms of Article 2223 of the Colombian Civil Code. In other words, the creditor can demand the price of the cryptocurrencies owed at the time and place where the payment should have been made, and will have the possibility to ask for compensation for damage.

39. Characterisation of the sales contract – Though it is not possible today to replace an obligation to give cryptocurrencies with a monetary obligation, the question of what the consequences would be if the parties stipulate a clause in that sense may be raised. As the use of cryptocurrencies is not forbidden, there will be a re-characterisation of the contract in which one of the terms is precisely the setting of a price and the legislator provides that that price must be a sum of money. That is in particular the case of sale. Indeed, under Article 1849 of the Colombian Civil Code, sale is a contract in which one of the parties binds themselves to give something and the other binds themselves to pay for it with a sum of money. That sum of money is the price. If the parties decide that the giving of cryptocur-

176. V. Rojo Vergara and C. Vera Bauerle, *Criptomonedas como medio de pago. Una aproximación a su naturaleza jurídica*, Memoria para optar al título de licenciado, Universidad de Chile, 2020, 63ff <https://repositorio.uchile.cl/bitstream/handle/2250/177964/Criptomonedas-como-medio-de-pago-una-aproximacion-a-su-naturaleza-juridica.pdf?sequence=1&isAllowed=y> accessed 10 March 2023.

177. A. Gámez Rodríguez (n 60) 234.

178. M. Alonso Jiménez (n 26).

179. supra nº 36.

180. A. Gámez Rodríguez (n 60) 238.

rencies is the 'price', it will not be possible to assert that this is a sale. The contract will be valid, precisely because using cryptocurrencies is admitted, but it will certainly be re-characterised: cryptocurrencies being an immaterial good, the contract by which one party binds themselves to the transfer of a good to another is, pursuant to Article 1955 of the Colombian Civil Code, a swap contract. The doctrine[181] and a few administrative authorities[182] thus expressly recognise it. It is important to underline that, under above-mentioned Article 1995, the swap refers to the obligation to give cash or an ascertained property in exchange for another ascertained property. If one admits that cryptocurrencies are fungible goods,[183] the re-characterisation of the operation into an exchange is difficult. However, the Colombian doctrine criticises the restrictive nature of that provision. An important number of authors say that either it is possible to apply, by analogy, the sales standards[184] or that it is possible to give an extensive interpretation according to which the legislator itself, in the matter of exchange, refers back to sales standards which do not limit the operation to ascertained property.[185] In addition, one should underline that the price could be, on the one hand, a sum of money and, on the other, a thing. If the thing is worth more than the sum of money, it will be an exchange, but if the sum of money is worth more than the thing, it will still be a sale.[186] That way, the parties could set a part of the price under the form of a sum of money and the other part in cryptocurrencies. If the sum of money remains higher than the value of cryptocurrencies, that will still be a sale. In any way re-characterisation could raise a few issues as to the non-enforcement of the swap contract, in case some provisions of the sale are incompatible.[187] One could think, for example, taking into account the *lésion*[188]. Though it is an issue that is being debated by the doctrine,[189] case law does not exclude taking the *lésion* into consideration in a swap contract.[190]

40. Commercial sale – Nonetheless, an author has suggested that, in the domain of commercial sale, it could be possible to set the price in cryptocurrencies.[191] The commercial

181. A. Gámez Rodríguez (n 60) 252.
182. Customs and Income Tax Office – CITO – Oficio 030470 of 2019 <https://www.dian.gov.co/normatividad/Documents/Compilacion-de-la-doctrina-tributaria-vigente-relevante-en-materia-de-criptoactivos.pdf> accessed 18 January 2023.
183. However, see the debates on that issue mentioned supra nº 26ff.
184. C. Gómez Estrada, *De los principales contratos civiles* (4th edn, Temis 2008) 153.
185. ibid, 154-55; J. P. Cárdenas Mejía, *Contratos, notas de clase* (1st edn, Legis 2021) 493; J. A. Bonivento Fernández, *Los principales contratos civiles y su paralelo con los comerciales* (17th edn, Librería Ediciones Del Profesional Ltda 2008) 355.
186. In that sense Article 1850 of the Colombian Civil Code.
187. Article 1958 of the Colombian Civil Code provides for the application, in a case of exchange, of the sales standards, except in case of incompatibility.
188. Authors refer to the *lésion*, a concept of civil law, which is ruled by the Colombian Civil Code and the French Civil Code, especially in Art. 1675 of the French Civil Code (see for translation of this latter, *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020). In spite of the absence of a similar concept in the common law systems, the one it comes closest to appears to be that of substantive inequality of bargain regarding the price in sales agreements.
189. J. P. Cárdenas Mejía (n 185) 49; C. Gómez Estrada (n 182) 155-56.
190. Corte constitucional colombiana, Sentencia C-222 of 5 May 1994; Corte Suprema de Justicia, Sala de Casación Civil SC948-2022, M.P.: L. A. Rico Puerta.
191. J. Mendoza Gómez (n 64) 411-12.

legislator, by providing that commercial bills[192] and debts representing a sum of money will be assimilated to a sum of money,[193] would open the debate as to the possibility to admit that whoever transfers a cryptocurrency gives an asset containing a debt representing a sum of money or transfers a sort of commercial bill.[194] However, that reasoning is not devoid of difficulties, as the author acknowledges. It would be difficult to include cryptocurrencies, understood as documents,[195] into the category of commercial bills – they are neither payment orders as such, nor promises of payment, and it is hardly possible to identify cryptocurrencies and title representing a commodity.[196] For our part, we think it is not possible today, under Colombian legislation, to understand cryptocurrencies as commercial bills. The holders of cryptocurrencies have no right to demand a sum of money, for lack of any support from the Central Bank. That way, the only manner to exchange cryptocurrencies for pesos (the only legal tender) would be to find someone ready to buy cryptocurrencies in exchange for a sum of money.

41. Classification of the loan agreement – Similarly, the fungible and consumable nature of cryptocurrencies[197] explains that it is possible to conclude, for example, a loan agreement on them. This would be a consumer loan agreement. In that case, in accordance with Article 2223 of the Colombian Civil Code, if the loan is about fungible things which are not money, there is the obligation to give back the same amount of things of the same sort and quality, taking into consideration the precisions that have just been made on the commutative or random nature of the contract.

b. In French law

42. Unlike in the German doctrine,[198] the issue does not seem to have been considered in those terms in French law yet. Similar reasonings could however be made. One can also wonder whether the obligation payable in cryptocurrencies entails re-characterisations which have sometimes significant consequences.

192. One should specify that the Colombian legislator admits, depending on the right they integrate, three types of commercial bills. Thus, Article 619 of the Colombian Civil Code provides that commercial bills cannot give rise to the right to demand payment of a sum of money (it would therefore be a commercial bill 'contenido crediticio'), or they may include social rights (it would be a commercial bill 'corporativo o participativo'). Lastly, the Colombian legislator accepts commercial bills that are representative of a commodity (that type of commercial bill is called 'de tradición').
193. See Article 905(3) of Colombian Commercial Code.
194. One should specify that, today, in Colombia, it is possible to refer to 'dematerialised' commercial bills, which explains the author's attempt at analysing the phenomenon of cryptocurrencies through the lens of commercial bills. See on the dematerialisation of 'commercial bills': J. Vicente Andrade Otaiza, *Teoría de los títulos valores* (Universidad Católica de Colombia 2018) 52-54.
195. Insofar as, at the moment the code is transferred (cryptocurrency in itself), from its holder to whoever will receive the cryptocurrencies, under the Colombian law on e-commerce – Act 527 of 1999 – that would be a document that could be identified as coming from the debtor in the sense that the transfer can only occur thanks to a password allowing to identify them, giving rise to the recognition of a signature: J. Mendoza Gómez (n 64) 415.
196. J. Mendoza Gómez, *Idem*.
197. Insofar as once the transfer of cryptocurrencies has been made the beneficiary will be the only one to have complete command of the cryptocurrencies: A. Gámez Rodríguez (n 60) 232.
198. S. Arnold, 'The Euro in German (private) law – monetary obligations and the mutual dependence of public and private law' in R. Freitag and S. Omlor (eds), *The Euro as Legal Tender, A comparative approach to a Uniform Concept* (De Gruyter 2020) 141, esp. 154-55.

43. Characterisation of the sales contract – Would the obligation issued in cryptocurrencies be compatible with characterisation as a sale?[199] Admittedly, Article 1582(1) of the French Civil Code, which provides that 'Sale is a contract whereby a person obligates himself to deliver a thing and the other to pay its price'[200] does not seem to oppose it, given the broad definition of payment.[201] The following texts however mention the concept of price.[202] Price refers to a sum of money.[203] As cryptocurrencies are not granted currency status,[204] it seems difficult to consider that they may be a price. It is also true that it has sometimes been admitted that the obligation to pay the price of the sale may be paid in nature,[205] especially when the good being the price could be assessed in monetary terms.[206] Then, in similar conditions, the capacity of cryptocurrencies to be a sales price may be conceivable. However, that possibility remains uncertain. In that respect, one should note that the draft project of contract-law reform precisely intends to expressly restrict the classification as a sales contract to a contract containing a price under the form of a sum of money in order to distinguish it from an exchange.[207] Such a writing would reinforce the idea that the stipulation of a payment in cryptocurrencies is an exchange. Moreover, the issue is not without influence on the application regime: a re-characterisation of the contract as a swap contract would entail the exclusion of some elements from the sales regime – for example, taking into account the *lésion* in a real property operation.[208]

44. Other regime issues – The characterisation of the loan agreement on cryptocurrencies has been the object of a decision of the *Tribunal de Commerce de Nanterre* in 2020 which

199. In English law, S. Green, 'It's virtually money' in D. Fox and S. Green (eds), *Cryptocurrencies in public and private law* (OUP 2019) 13, esp. nº 2.26.
200. *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 317.
201. supra nº 8.
202. eg Art. 1583 and 1589 of the French Civil Code.
203. O. Barret, updated by P. Brun, 'Vº Vente: structure' (July 2019 – update February 2023) Répertoire de droit civil Dalloz, nº 33, 38; O. Barret, updated by P. Brun, 'Vº Vente: formation' (July 2019 – update February 2023) nº 400.
204. supra nº 17.
205. Draft bill on the reform of contract law. Committee chaired by Professor P. Stoffel-Munck, 9 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 9 March 2023.
206. O. Barret, updated by P. Brun, Dalloz, Rép. civ., Vº 'Vente: formation', July 2019 (n 203), nº 401.
207. Art. 1582 (1) and (2) of the Draft bill on the reform of contract law (commented). Committee chaired by Professor P. Stoffel-Munck, July 2022, 11: 'A sale is the contract by which, in exchange for a price, the seller gives the ownership of a tangible or intangible good up to the buyer. The price consists in a sum of money. It may be completed with the provision of a good or service', and 9 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 2 July 2023. See also on exchange, ibid, 48.
Compare Art. 12 of the Suggestion of reform of the law of special contracts made by the Henri Capitant Association, 18: 'A sales contract is a contract by which the seller transfers the ownership or any other right in rem to the buyer who binds themselves to pay its price. The rules of the present Chapter apply as appropriate to contracts in which the buyer binds themselves to pay consideration other than price, and to the contracts in which the owner constitutes jus in rem on a good in return for payment.' <https://www.henricapitant.org/actions/offre-de-reforme-du-droit-des-contrats-speciaux/> accessed 2 July 2023.
208. Art. 1706 of the French Civil Code *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 326: '*There is no rescission for lesion of the contract of exchange.*'
Compare supra nº 39 in Colombian law.

considered it was a consumer loan.[209] In a general way, the question of whether the contract becomes a random one could be raised[210] given the instability of cryptocurrencies and all its consequences, in particular, the exclusion of rescission for a *lésion* in case of hazard in the sale.[211] Moreover, the obligation issued in cryptocurrencies would rather badly comply with the principle of the nominal value of money as expressed in Article 1343(1) of the French Civil Code.[212] That principle, which relies on the stability over time of the value of the money that is the object of the contract, has been derived from the law of consumer loan and generalised.[213] Admittedly, it is not obvious that the obligation denominated in cryptocurrency is an obligation of a sum of money,[214] which would result in its not being subject to that principle. However, the fact that it is a good which is intended to be an exchange unit, like monetary units, if not a universal one, at least a common one, makes it necessary to think about its enforcement. Applied to the obligation issued in cryptocurrencies, the principle of the nominal value of money would place the parties in a dangerous situation. That would justify additional information or resorting to the conventional adjustments of nominalism.[215] In particular, would it not be possible to provide that the payable amount of the cryptocurrencies would be determined by reference to the value of a good, that process then referring to the technique of the *dette de valeur*?[216] Lastly, the enforcement of such an obligation seems ill-adapted. Another difficulty is that of the nullity of some operations realised during the *période supecte*, that is, after the suspension of payments of a company for which insolvency proceedings have been commenced.[217] Among other concerned laws, Article L. 632-1 of the Commercial Code provides that '4° Any payment of due debts, made by any other means than cash, commercial bills, bank transfer, assignment of a credit-claim subject to Art. L. 313-23 of the Monetary and Financial Code or any other means of payment usually admitted in business relations' is void. Here we see that payment in cryptocurrencies may be declared null for not being an ordinary method of payment if it is made in during the *période suspecte*.

209. D. Legeais, 'La qualification des opérations portant sur le Bitcoin', Observations sur la décision du tribunal de commerce de Nanterre du 26 février 2020 (2020) N° 3 Revue de droit bancaire et financier, 7; J. Moreau, 'Lorsque les juges du fond se penchent sur la nature juridique du Bitcoin et des prêts y relatifs – Tribunal de commerce de Nanterre 26 February 2020' (2020) AJ contrat, 296; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) N° 19 *JCP E* 1201.
210. D. Legeais, Fascicule 535: Actifs numériques et prestataires sur actifs numériques (October 2019) JurisClasseur Commercial, n° 69.
211. Art. 1681 of the Draft bill on the reform of contract law (commented). Committee chaired by Professor P. Stoffel-Munck July 2022, 45 <http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/consultation-sur-lavant-projet-de-reforme-du-droit-des-contrats-34548.html> accessed 2 July 2023. See also Art. 42 of the Suggestion of reform of the law of special contracts made by the Henri Capitant Association, 28 <https://www.henricapitant.org/actions/offre-de-reforme-du-droit-des-contrats-speciaux/> accessed 2 July 2023.
212. Art. 1343(1) of the Civil Code, from *French Civil Code, Code civil français, English-French-Arabic*, under the supervision of M. Séjean (LexisNexis 2020) 277: 'The debtor of an obligation of a sum of money is released by the payment of its face amount'.
213. S. Benilsi, 'Paiement' (February 2019 – updated December 2019) Répertoire de droit civil Dalloz, n° 122 ff. See also, M. Julienne (n 56) n° 562ff and T. Bonneau (n 67) 79, esp. 88 according to whom nominalism is linked to legal tender for the purposes of Article 1895 of the Civil Code.
214. supra n° 16.
215. On the conventional adjustments of the principal of nominalism, S. Benilsi (n 61) n° 122ff; M. Julienne (n 56) n° 562ff.
216. On the *dette de valeur*, Art. 1343-3 of the Civil Code. See M. Julienne (n 56) n° 564; J. François (n 24) n° 55ff. See also on that technique, Rémy Libchaber (n 71) Thomas Le Gueut (n 70).
217. Art. L 632-1ff of the Commercial Code.

45. Those are the first difficulties that one could think of in relation to the obligation which would be issued in cryptocurrencies. Even if accepted by the parties, that process may cause later challenges. Moreover, if one considers payment in cryptocurrencies, which would be admitted because accepted by the parties, it is necessary to also study the different case in which the obligation is denominated in a usual currency but payment is made in cryptocurrencies.

2. The obligation issued in legal tender but paid in cryptocurrencies

46. We will first study Colombian law (a) then French law (b).

a. In Colombian law

47. Between dation and novation – There may be restrictions as to the possibility to replace a monetary obligation by an obligation in cryptocurrencies, but those restrictions are not absolute. The creditor of a monetary obligation may always accept to receive cryptocurrencies instead of a sum of money, either at the time of payment, which would then lead to the characterisation of a dation in payment,[218] or before payment, by agreement with the debtor in order to conclude a novation, by which they therefore decide that the obligation of paying a sum of money is extinct and replace it with that of giving cryptocurrencies.[219] However, the Central Bank has not recognised dation in payment in the case of payment of obligations derived from an external debt on the pretext of the uncertainties linked to the account management of crypto-assets and the precise way to establish their value to include them into the property of who receives them.[220] For us that position is questionable since even though it may be difficult to set the value of crypto-assets, that does not mean that it is impossible to determine it. Then, it seems that the denial is more due to the nature of the debts considered than to the difficulty of setting the value of crypto-assets.

b. In French law

48. Dation in payment – In this second case, payment in cryptocurrencies may be admitted, assuming the creditor agrees to it, pursuant to Article 1342-4 of the Civil Code which provides that the object of the payment may not be different from the object of the obligation, of the performance owed by the debtor, except if the creditor accepts to receive something else, in which case a dation in payment is made.[221] That is what is sometimes put forward to explain conventional payment in cryptocurrencies.[222] However, the analysis relies on frail premises which once again show how ill-adapted our law is to payment in cryptocurrencies. On the one hand, to accept it, it is considered that cryptocurrencies are goods that may be received as payment, and are different from the sum of money which is payable and provided for in the obligation. More precisely, the idea being defended is that, because cryptocurrencies are not granted currency status and do not have equivalent power to discharge, payment in cryptocurrencies is a dation.[223] However, on the other hand, it has also been shown that if cryptocurrencies are subject to the dictates of the regime of mone-

218. About dation in lieu of payment: F. Navia Arroyo, 'Variaciones sobre la dación en pago', Estudios de derecho civil en memoria de Fernando Hinestrosa, t. I. (Universidad Externado de Colombia 2014) 547-78.
219. A. Gámez Rodríguez (n 60) 236-37.
220. Banco de la República, Secretaría de la Junta Directiva, 1 April 2019 <https://www.banrep.gov.co/es/banco/junta-directiva/conceptos/jds-ca-04637> accessed 13 February 2023.
221. On *dation* in lieu of payment, J. François (n 24) nº 19 and Nº 139ff.
222. D. Legeais (n 210) nº 69.
223. F. Grua, updated by N. Cayrol (n 61) nº 87.

tary obligations, the payment realised in cryptocurrencies cannot be seen as a dation in payment.[224] On that issue, it should however be possible to consider that, in the current state of the law – ie the lack of admission that cryptocurrencies are currencies, but the admission that it is a conventional method of payment – when an obligation is payable in legal tender but paid in cryptocurrencies, it is actually a dation in payment. That shows that the difficulty in characterising the special object that cryptocurrencies are leads to many difficulties of regime. Concretely speaking, here again,[225] the realisation of the dation would raise implementation difficulties linked to the determination of an equivalent.

49. Novation, optional or alternative obligation – Here too, dation in payment should be distinguished from close mechanisms, first among which novation. That technique is subject to Articles 1329 and following and, as far as we are concerned, consists in the replacement of an obligation by another,[226] that is, in the replacement of an obligation issued in legal tender by an obligation issued in cryptocurrencies. In these circumstances, the difficulties mentioned above[227] should be considered to arise. If one goes back in time a little, one should consider the hypothesis in which the obligation, though denominated in legal currency – ie payable in euros – has been conceived since the beginning as admitting a differentiated execution – here in cryptocurrencies. It has been noted that it is only the imperative or obligatory nature of a payment in foreign currencies which would go against the principle of using the euro:[228] as Thierry Bonneau said, 'the clause which allows the debtor to discharge their obligations in euros or in another currency is lawful'.[229] From that point of view, it seems possible to provide for an obligation which would be payable in euros or in cryptocurrencies. Would this process not allow precisely the use of cryptocurrencies to comply with the legal principle requiring the use of the euro?[230] Two paths seem possible then: such a case would be like an alternative obligation provided for in Articles 1307-1307-5 of the Civil Code or the optional obligation provided for in Article 1308 of the Civil Code. In the first option, while two performances are owed, the debtor's obligation is discharged thanks to the performance of only one of them; in the second, only one performance is owed but the debtor may discharge their obligation by realising another one.[231] Those are techniques that would make it possible, following different time, conditions and effects,[232] to pay in cryptocurrencies an obligation issued in euros.

224. M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 14, which, according to the author, would lead to their prohibition on the ground of Article 1343-3 of the Civil Code which requires the use of the euro. On that question, supra n° 16.

225. supra n° 47.

226. M. Julienne (n 56) n° 383ff; J. François (n 24) n° 116ff, esp. n° 131ff on novation by change of subject-matter.

227. supra n° 42ff.

228. supra n° 17.

229. T. Bonneau (n 44) n° 745 and references in footnote 138: the author bases this idea on a decision of the *Cour de Cassation* of 11 July 2018, appeal N° 11-19884, confirming the annulment of a national-law loan agreement imposing on the borrower to reimburse the sums owed in Swiss francs.

230. The hypothesis – exonerating from Article 1307-1(1) of the Civil Code (M. Julienne (n 56) n° 83; J. François (n 24) n° 337) – in which the option would belong to the creditor of the alternative obligation, which may make payment in cryptocurrencies imperative on the debtor, will be left aside.

231. On the difference between those obligations and their regime, M. Julienne (n 56) n° 80-92; J. François (n 24) n° 337ff.

232. On the proximity of those processes, in particular between dation and optional obligation, M, Julienne (n 56) n° 91 and footnote 40; J. François (n 23) n° 337 and references in fn 3.

50. Leaving aside the questions raised by the payment in cryptocurrencies of an obligation denominated in legal tender and that of the characterisation of the obligation issued in legal tender, one should focus a little on the proof of payment in cryptocurrencies.

3. The proof of payment in cryptocurrencies

51. The proof of payment in cryptocurrencies – The possibility to pay in cryptocurrencies raises the issue of the proof of payment. In French law, Article 1342-8 of the Civil Code has been regulating the means of proof of payment since the 2016 reform.[233] Pursuant to that text, the proof of payment may be realised by any means, independently of the existing debate on the nature of payment, even though in practice that proof often results from the issuance of a receipt by the *accipiens*.[234] In Colombian law, the means of the proof are regulated by the General Code of Procedure. Thus, in principle, according to the rule of freedom of evidence, payment may be proven by any means,[235] except when proving the payment of an obligation deriving from a contract or a convention. In that case, the absence of document or of the beginning of a written proof will be considered by the judge as a serious indication of the non-existence of payment, unless, because of the circumstances in which the payment was made, it was impossible to get it, or the value and quality of the parties justify such an omission. Payments made *via* the classic banking system do not create any difficulty for it will always be possible to prove them thanks to a bank statement or certificate.[236] On the contrary, demonstrating a payment in cryptocurrencies could not be that easy, precisely because of the usually pseudonym nature of transactions in cryptocurrencies.[237] Admittedly, the information about transactions which has been recorded in the blockchain may theoretically be reproduced in a reliable manner allowing to establish the proof of the payment and its date. The blockchain is regularly extolled for its capacity to establish evidence, because of the unforgeable character of the information contained.[238] Indeed, the blockchain precisely allows – because of the digital fingerprint of the recorded operations showing the date and time in the chain of blocks and link to the private key of the user – to identify in a dependable manner the operations that have been realised.[239] That is the hashing function – and if need be using hashing trees or *Merkle trees* used by Bitcoin – which allows for that permanent recording in the chain of blocks and their identification,[240] while network transactions are verified via mining.[241] In reality, more than the authenticity of information and the reliability of chains of transactions,[242] it is the linking of that information to the people in question which creates difficulties. The difficulty comes in particular from the fact that the users use the network under a pseudonym, to preserve their private lives and the secret nature of their transactions.[243] Admittedly, the traceability of operations would theoretically allow to find the person who has made the transaction based on the

233. M. Julienne (n 56) nº 553, 376; J. François (n 24) nº 32-33.
234. M. Julienne (n 56) nº 214, nº 553-554; J. François (n 24) nº 31-33.
235. In that sense Article 165 of the General Procedure Code. See F. Hinestrosa, *Tratado de las obligaciones, t. I, concepto, estructura, vicisitudes* (Universidad Externado de Colombia 2002) 653-55; H. D. Velásquez Gómez, *Estudio sobre obligaciones* (Temis 2012) 1113-15.
236. J. François (n 24) nº 33.
237. A. Gámez Rodríguez (n 60) 237.
238. P. De Filippi (n 2) 47-49.
239. P. De Filippi (n 2) 52.
240. P. De Filippi (n 2) 19-22.
241. supra nº 4.
242. See also on that last point P. De Filippi (n 2) 25ff the correction, by the network, of a payment made twice.
243. P. De Filippi (n 2) 41, esp. on Bitcoin.

pseudonym data.[244] However, once again, that link needs to be established, if need be with the help of the concerned platforms. In European law, the regulation will now impose that operations realised by the providers of payment services on crypto-assets be traceable, thanks to Regulation of 31 May 2023,[245] the collected information being subject to the regime of the General Data Protection Regulation.[246] Between the parties, there are two possible solutions: the first is that the debtor requires a payment receipt from the creditor, which is an obligation of the latter;[247] the second consists in the parties identifying, in their contract, their addresses or public keys to access the blockchain. Thus, there is no pseudonym state and the debtor can prove that payment has been made from their address to that of the creditor.[248] One should note however that there are cryptocurrencies which operate with a completely anonymous and confidential system[249] and that private blockchains, in particular *consortium* ones, are based on a principle of reinforced confidentiality and are opposed to the disclosure of information outside the limited circle of their participants, which are known inside the blockchain.[250] Then, the proof of the payments realised on the blockchain does not seem to create technical difficulties, since it may always be constituted beforehand by classic means. By contrast, the issue seems to create a real ideological incompatibility, since the process relies in an essential way on the confidentiality of the operations. One may also wonder whether users will agree to conform with the usual modes of prior constitution of the proof. The admissibility of cryptocurrencies as methods of payment definitely creates significant difficulties.

52. Conclusion on the state of the law – In short, in French law as in Colombian law, while cryptocurrencies may not be currencies with full power to discharge, for lack of legal discharging power, they may be used for payment, provided the parties agree. However, their being used as a conventional method of payment creates many legal difficulties. That results from the fact that cryptocurrencies cannot be assimilated to legal tender but may not be considered as ordinary goods either.[251] From that point of view, their discharging power would in reality be intermediary. It is not possible to disregard the fact that their instigators and users wish for the mechanism to be a real means of payment. There results a strong unsuitability of our laws of payment which shows in relation to the principle of payment in cryptocurrencies, as well as in relation to its consequences. Indeed, the law of payment does not currently welcome with certainty the possibility of a conventional payment in cryptocurrencies, even though it were admitted by the Court of Justice of the European Union for the European Union. In addition, it does not provide specific protection for its users, which could rely on reinforced warning or, if need be, on the limitation of the area of intervention

244. P. De Filippi (n 2) 42.
245. Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 *on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849*, [2023] OJ L 150/1 (10).
infra n° 67 on that issue.
246. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 199/1, (19) and on data retention period (54).
247. See, for example, Article 877 of the Colombian Commercial Code.
248. A. Gámez Rodríguez (n 60) 238.
249. P. De Filippi (n 2) 42ff.
250. P. De Filippi (n 2) 65ff; D. Legeais (n 15) n° 11, according to whom it would not be a real blockchain.
251. M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 14 mentioning the idea that cryptocurrencies may not be 'likened to just any swap object' but noting some reluctance.

of that method of payment. Beyond substantive law, it is therefore necessary to think prospectively. What discharging power will cryptocurrencies have tomorrow? Are they intended to be classified as currencies and/or receive a new legal treatment? In that case, what legal treatment could be considered? This perspective is all the more necessary as the unsuitability of substantive law has shown that there are many projects.

II. *De lege ferenda*, what payment law for cryptocurrencies?

53. When thinking about prospective law in relation to cryptocurrencies one should come back, outside substantive-law characterisations and regimes, to the theoretical and political foundations that would determine the regulation of cryptocurrencies. That means, before studying the content of possible systems, going back to the theoretical premises of what cryptocurrencies are and, beyond that, to the main guidelines of legal policy that could direct the regulation of cryptocurrencies. We will, first, consider the theoretical and political foundations of the regulation of cryptocurrencies (A) and, second, present and assess the current projects and new regulations, that is, the prospects of the framework that cryptocurrencies are subject to (B).

A. The theoretical and political foundations of a regulation on cryptocurrencies

54. When trying to determine the theoretical motives of a regulation on cryptocurrencies, the issue of their being assimilated to currencies is one of particular interest. Could or will cryptocurrencies be characterised as currencies? It is necessary to assess their capacity to be included into the theory of currency eventually. Beyond that, the issue of the political determiners of a future regulation seems useful to decide. Does it depend on the suggested theoretical approach? Moreover, what characteristics and what limit of the considered object – cryptocurrencies – and its current regulation could direct the future choices of legal policy in that matter? Let us consider, first, the theoretical issue of characterisation as currencies (1) before suggesting the different steps of a legal policy of payment in cryptocurrencies (2).

1. The unlikely characterisation as currencies

55. Monetary sovereignty and public institution – One of the elements that are presented as constituting a currency is its inherent link to the State. That condition naturally excludes cryptocurrencies, the ambition of which is the very opposite since their promoters precisely aim to break away from the State system.[252] And, in fact, cryptocurrencies are issued by private operators without any link with States. Currency however is commonly thought to be only issued by the State. Jean Carbonnier began his definition of currency as follows: 'One should start with stating that the timeless principle of currency is a public institution, a

252. supra n° 4 on the political ambitions of the creators of the blockchain and cryptocurrencies.

sovereign State mechanism, an attribute of sovereignty'.[253] That has been the case since the Antiquity and the principle remains in our modern systems.[254] According to classic theory, currency could not apply to other elements than those granted legal tender by the State.[255] In that sense too, Caroline Kleiner develops the idea that the power attached to currency depends on a State decision, which allows to guarantee the value of the monetary unit, thus ensuring confidence in the instrument.[256] In France, monetary competence has been delegated to the European Union institutions. Indeed, the Union has exclusive competence in monetary policy matters under Article 3 of the Treaty on the Functioning of the European Union.[257] Monetary institutions – the European system of central banks in Europe – ensure the diffusion of monetary policies and therefore the regulation of the economic system.[258] Moreover, the intervention of the State, a last-resort lender, allows to keep the level of cash necessary to the functioning of the economy and the management of crises, if need be.[259] In Colombia, as has been underlined,[260] it is the Parliament[261] and the Central Bank[262] which have jurisdiction to establish which currency has legal tender in the country. Therefore, some authors have not hesitated to underline that classifying cryptocurrencies as currencies would mean losing a part of sovereignty.[263] However, for others, the intervention of the State is not a *sine qua none* condition of the existence of a currency. The State theory had long been put into perspective by some authors among whom Nussbaum who developed a sociological theory of currency.[264] Later, Rémy Libchaber defended the idea that State intervention is not a condition of currency.[265] The currency would not depend on a State competence by nature and State intervention would be the consequence of a State appropriation of the powers related to currency for the needs of its public policies.[266] Moreover, still according to this author, the State theory would falter on the reality of monetary creation which is, mainly, the work of banking institutions when they grant loans, rather than of the State.[267] Dominique Carreau has also nuanced that classic theory.[268] Recently, Nicolas Mathey, in an

253. J. Carbonnier, *Droit civil 2, Les biens, Les obligations* (PUF 2004) nº 671.
254. On the Late Roman Empire when the emperors imposed a money-issuance monopoly and built up some monetary policy, R. Szramkiewicz and O. Descamps, *Histoire du droit des affaires* (3rd edn, LGDJ 2019) nº 92-94, and esp. nº 694. See the criticism on the use of that factual historical circumstance as an argument to support the State theory, R. Libchaber (n 71) nº 68.
255. Repeating in a critical way this reasoning which leads to excluding scriptural money from the currency category, D. Carreau (n 85) 309, 346-47.
256. C. Kleiner, *La monnaie dans les relations privées internationales*, foreword by P. Mayer (LGDJ 2010) nº 70 and nº 93ff. on the *lex monetae*, a law of the State issuing the currency applicable to the considered monetary unit.
257. Compare with supra nº 2, 11.
258. D. Plihon (n 18) 85ff.
259. M. Aglietta and N. Valla, 'III. Banques et systèmes de paiement' in Michel Aglietta and N. Valla, *Macroéconomie financière (*La Découverte 2017) 97-120, esp. nº 50 on the risks of free banking, and nº 59.
260. supra nº 11.
261. In that sense Articles 150 and 371 of the Political Constitution.
262. In that sense Article 371 of the Political Constitution and Article 6 of Act 31 of 1992, on the operational standards of the Central Bank.
263. A. Gámez Rodríguez *(*n 60) 214.
264. D. Carreau (n 85) 309, esp. 367ff mentioning the criticism made by Mann, a supporter of the State theory. See also on those theories, H. de Vauplane, 'Un euro numérique est-il légal?', Revue d'économie financière, (2023) 1, Nº 149, 121, esp. 125-26 mentioning a third so-called institutional theory.
265. R. Libchaber (n 71) nº 57 to 76.
266. ibid nº 73, and 74.
267. ibid nº 75, though there does exist a State supervision especially with the control of interest rates on that creation of scriptural money. See also, D. Carreau (n 85) 309, 365-66.
268. D. Carreau (n 85) 388.

analysis on cryptocurrencies, has questioned the State theory of currency.[269] Some economists also criticise the assertion that the currency is only a State competence.[270] Pepita Ould Ahmed, an economist, has shown that complementary local currencies, created outside banking institutions, have emerged in periods of crisis, but also in communities advocating certain values, especially mutual assistance.[271] According to those analyses, to admit that an instrument could do without a State intervention, it should be considered that the currency – a first and foremost social institution – is based on the trust of its users. Could cryptocurrencies generate enough confidence? Nicolas Mathey has developed the idea that the trust cryptography inspires in its users may be decisive.[272] That confidence, of a new nature, would be an element inherent in the innovation that the blockchain is. As Primavera De Filippi says, 'The blockchain thus shows the change from a trust-based system to a proof-based system: as long as one trusts the underlying technology, one does not need to trust anyone'.[273] The process then makes the intervention of a third-party guarantor – the State for currency – useless. In any case, one may wonder about the motives of that possible trust, and in particular about the risk that support for cryptocurrencies mainly relies on distrust of the institutions,[274] and about its scope. How far could it go? Is it really possible to imagine confidence in the mechanism if it is not universal, or at least widely shared? This seems dubious for now[275] and the near future, especially since the recent failure of a major operator on the market will likely dent that trust[276] and the remedies offered to restore it seem to rely on the intervention of a public or private third party.[277] Then, though it is possible to admit that the link between currency and State is not always obvious, the possibility that it may be supplanted, regarding cryptocurrencies, is far from established. In reality, cryptocurrencies may be disqualified as currencies because of their incapacity – per se, that is, as an autonomous mechanism – to fulfil the functions of currencies and present their characteristics.

56. Characterisation as a currency from an economic perspective – As defined by economists, 'the currency is all the assets of the economy that individuals regularly use to buy goods and services from other individuals'.[278] The currency is usually considered to have

269. N. Mathey (n 23) n^os^ 14 to 17, also criticizing the link between currency and legal tender at n° 18. On the issue of legal tender, supra n^os^ 13 to 15.
270. J.-M. Servet, V° 'Monnaie' in M. Cornu, F. Orsi and J. Rochfeld, *Dictionnaire des biens communs* (1st edn, PUF 2017) 805-08. Compare with J. Couppey-Soubeyran, in collaboration with G. Arnould, *Monnaie, banques, finance* (PUF 2017) 103-04. See also about that school of thought, M. Pilkington (n 30) 406.
271. P. Ould Ahmed, V° 'Monnaie locale complémentaire' in M. Cornu, F. Orsi and J. Rochfeld (Eds), *Dictionnaire des biens communs*, (1st edn, PUF 2017) 808-12. See ibid esp. 810, on the logic behind those complementary currencies (author's italics): 'The currency must allow to circulate value and not to accumulate it in the hands of a minority'.
    Compare also on that topic, D. Plihon (n 18) n° 29ff, and esp. n° 32 which notes that complementary currencies are 'not real currencies'. See also M. Pilkington (n 30) 406 underlining that the issue of private currency is now focused on cryptocurrencies.
272. N. Mathey (n 23) n° 29-30 studying whether that trust is enough.
273. P. De Filippi (n 2) 5.
274. N. Mathey (n 23) n° 27. See supra n° 5.
275. M. Aglietta and N. Valla (n 259) n° 49.
276. On that question, Interview by D. Legeais and H. de Vauplane, 'Actifs numériques, Regards croisés sur les conséquences de la faillite de FTX' (2023) N° 2 Revue de Droit bancaire et financier, 6 and especially the idea developed by H. de Vauplane that the loss of confidence would be about actors more than crypto-assets.
277. ibid mentioning the proof of reserves established by an audit external to the platform and the advantage of currencies issued by central banks on that point.
278. N. G. Mankiw and M. P. Taylor, *Principes de l'économie* (6th edn, Deboeck superieur 2022) 686, 723 and 1010.

three economic functions: it is at the same time an 'account unit *which allows to assess the value of heterogeneous goods*', a 'payment instrument *which allows to get any good or service*', and a 'store of value', being an asset that is kept and may be used by economic agents.[279] Some sometimes say that though cryptocurrencies or virtual currencies may correspond to the economic definition of currency, they do not fulfil its legal criteria.[280] However, it is not sure that those so-called economic conditions could be considered to be met. The role of value is central in the definition of currency,[281] but the volatility of cryptocurrencies is problematic. This volatility is all the stronger as the fluctuations of the exchange rate of cryptocurrencies cannot be corrected by political actions, as national currencies may.[282] Some have considered that using cryptocurrencies as a means of exchange would be enough to classify them as currencies.[283] According to some economic schools of thought, being an instrument of exchange may be the most fundamental function in the definition of currency.[284] However, the difficulties for cryptocurrencies to become means of payment are well known. Moreover, the other functions of currency may also be difficult to identify.[285] Cryptocurrencies have been conceived and are perceived by their users as a store of value and those assets may draw investors, despite the wide variation in their value.[286] But the idea that this volatility may also oppose their use as a store of value has been suggested.[287] The difficulty of considering that cryptocurrencies have a store-of-value function may be explained by their instability and the lack of State support. Lastly, the account unit would result from a social agreement which allows to establish a reference frame.[288] Cryptocurrencies would not be used as account units either, for the volatility that characterises them would prevent their being a reference for the setting of prices.[289]

57. Characterisation as a currency from the legal point of view – Jurists have left aside the economic definition of currency and propose their own vision of it. Admittedly, among the community of jurists itself, the definition of currency varies. But it is possible to mention a few elements. Rémy Libchaber has criticised the functional approach of currency.[290] It seems to be insufficient. The above-mentioned decision of the *Tribunal de Commerce de Nanterre* in 2020 admitted that Bitcoin had a function of currency, but did not characterise it as one.[291] The statement of the motives for the last Bill 139 of 2021, in which the Colombian Government tried to regulate services of exchange of crypto-assets, seems to have followed the same path. Indeed, it said that though those crypto-assets may fulfil the function of a

279. D. Plihon (n 18) 3-4. See also as to those functions, J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 101.
280. D. Carreau, C. Kleiner (n 23) nº 16; T. Bonneau (n 33) 1008-09.
281. M. Aglietta and N. Valla (n 259) nº 8.
282. H. de Vauplane (n 2) nº 2.
283. A. Rodríguez Gámez (n 60) 208. See on the importance of the function of exchange of a good to be considered as a currency: S. Gutiérrez (n 21) 125, *Bitcoin, la moneda descentralizada de curso voluntario, como equivalente funcional del peso colombiano*, Ibáñez, Bogotá, 2022, 125.
284. J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 104.
285. ibid (n 266) 117 on Bitcoin.
286. M. Aglietta and O. Lakomski-Laguerre (n 30) nº 10.
287. M. Pilkington (n 30) 403 quoting a study of 'Pfister (2020)'.
288. J. Couppey-Soubeyran, in collaboration with G. Arnould (n 270) 102.
289. S. Canales Gutiérrez (n 21) 135; A. Barroilhet Díez (n 25) 48-49. See M. Pilkington (n 30) 407.
290. R. Libchaber (n 71) nº 15; C. Kleiner (n 66) nº 6. See N. Mathey (n 23) nº 21ff developing the idea that the criterion of the discharging power is 'determining' but insufficient and must be completed with social acceptance of that currency.
291. D. Legeais (n 15) 6, esp. nº 2, 6, 7.

currency, that is not enough to consider they are one.[292] From a theoretical point of view, according to Rémy Libchaber, a currency is characterised by the existence of a value unit and a payment unit – the former allowing to assess and enter into an obligation and the latter to pay it.[293] According to the author, the two are necessary to constitute a currency and to ensure 'the functioning of a system of monetary obligations',[294] though the value unit is presented as the most fundamental element.[295] Caroline Kleiner differentiates abstract currency from concrete currency, that is, the monetary unit and the monetary power, which, concretely speaking, has a discharging power.[296] The former, an element of the monetary system, belongs to the public-law standard and refers to the capacity to evaluate;[297] the second belongs to internal or international private relations and is included into a monetary medium[298] – those elements together allowing to explain currency.[299] The author characterises monetary power as a subjective, non-fungible right having a power to extinguish debts.[300] Here again, applied to cryptocurrencies, there is no favourable outcome for those legal definitions of currency. A cryptocurrency, as has already been mentioned, may not be a standard of value which would be a reference for users. It is above all the cryptocurrencies capacity to be those value references which is problematic.[301] Moreover, as has also been demonstrated, the power of cryptocurrencies is not the same as the currency for lack of having a real universal or even generalised discharging power.[302] Assuming that cryptocurrencies serve as conventional methods of payment, it is difficult to grant them a monetary power now,[303] which is unquestionably a missing element to classify them as currencies. The characteristics of cryptocurrencies do not seem to allow a decisive characterisation. It is not certain either that cryptocurrencies meet the condition of fungibility, which, incidentally, is not attached to currency by all the authors.[304] [305] It is true that the *Tribunal de Commerce de Nanterre* granted Bitcoin the characteristic of being a fungible good in that famous decision of 2020.[306] However, cryptocurrencies are not recorded as such in the blockchain but in relation to the transactions they are the object of.[307] Beyond that, the very process of the

292. In that sense the explanatory statement of Bill 139 of 2021 <https://www.camara.gov.co/criptoactivos> accessed 25 February 2023.
293. R. Libchaber (n 71) n° 17ff.
294. ibid n° 483.
295. ibid n° 80 and n° 483 specifying (fn 1) that the value unit has a decisive role to 'compare all the products and the description of the obligations'.
296. C. Kleiner (n 66) n° 14ff.
297. ibid n° 16ff and n° 53.
298. ibid n° 54ff.
299. ibid n° 89.
300. ibid n° 66-67. Compare with the payment units being called subjective rights, R. Libchaber (n 71) n° 40ff.
301. C. Kleiner, Chronique de droit bancaire international (2021) N° 5 Revue de droit bancaire et financier, 2, n° 8, on keeping the dollar as an account unit in the law admitting Bitcoin as legal tender. On that recognition, cf infra n° 63, 73.
302. T. Bonneau (n 33) 1011.
303. supra n° 12ff.
304. *Contra* D. Legeais (n 15) n° 6.
305. Though in Colombian law the majority doctrine does not question the fungible nature of cryptocurrencies: supra n° 26, esp. D. Guzmán, 'Aspectos legales de los NFT's en Colombia' <https://propintel.uexternado.edu.co/fr/aspectos-legales-de-los-nfts-en-colombia/> accessed 18 March 2023, which underlines that the fungible nature of cryptocurrencies would be due to the fact that they represent a specific value allowing them to be replaced by other cryptocurrencies within a blockchain as soon as they serve as a method of payment with the same value.
306. supra n° 44 (n 197).
307. P. de Filippi (n 2) 36 and 42. *Contra,* for whom cryptocurrencies remain fungible despite those circumstances, D. Legeais (n 15) n° 4; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) N° 19 *JCP E* 1201, n° 7-8.

blockchain jeopardises the capacity of cryptocurrencies to be fungible, especially because a cryptocurrency could hence keep the sign of the lawfulness of a previous transaction.[308]

58. Characterisation as a currency and technical limits of cryptocurrencies – From all the above considerations, it appears that cryptocurrencies may be characterised as currencies because of their characteristics, which reveal their technical limits. If cryptocurrencies have not become important in the domain of payment, it is indeed because of their weaknesses, which oppose their becoming widely admitted currencies. Those weaknesses have been noted. The multiplicity of cryptocurrencies is obviously one of the obstacles to their advent.[309] Their incapacity to offer a stable value system is another.[310] Lastly, the multiplication of frauds linked to cryptocurrencies and other unlawful activities having happened on several platforms of the world of crypto-assets explains a level of distrust towards them.[311] Those three elements can affect trust in cryptocurrencies. Then, assuming even that the State argument be put aside, the trust necessary for them to be accepted as currencies seems quite hypothetical.[312] In addition, the rarity of Bitcoin is another source of difficulties. Its issuance in limited amount favours hoarding behaviours rather than using it as a method of payment.[313] Moreover, from a more systemic point of view, Bitcoin, issued in limited number, is not enough to provide a sufficient amount of cash.[314] Then it seems that the structure of cryptocurrencies does not provide the expected technical characteristics of a currency – for users and the needs of the system.

59. Characterisation as a currency, the special case of stablecoins – In addition to Bitcoin, there are many cryptocurrencies, which show the same deficiencies.[315] One category is different and may renew the analysis – stablecoins.[316] Those stablecoins, because they are backed by an underlying asset which may have legal tender, would have additional guarantees of stability because of their lesser volatility.[317] How could they be characterised? One should note that not all stablecoins work in the same way: while some – the fiat stablecoins – are actually backed by legal tender such as the euro or the dollar, others are linked to another type of asset which may be volatile.[318] But it is true that the development of stablecoins corresponds to a reality, though the latter is less accomplished. The Libra project[319] of

308. P. de Filippi (n 2) 42. Compare with M. Julienne, 'Les crypto-monnaies: régulation et usages' (2018) N° 6 Revue de droit bancaire et financier, Study 19, n° 9 for whom the argument must be put into perspective especially because of the methods available to interfere with traceability.
309. D. Legeais (n 15) n° 37, and n° 38ff for a presentation of the best-known cryptocurrencies.
310. supra esp. n° 55.
311. See on that topic <https://www.bloomberglinea.com/2023/03/10/cayo-el-encanto-por-las-criptomonedas-en-colombia-asi-estan-cifras-de-adopcion/> accessed 18 March 2023.
312. Indeed, according to recent studies <https://www.bloomberglinea.com/2023/03/10/cayo-el-encanto-por-las-criptomonedas-en-colombia-asi-estan-cifras-de-adopcion/> accessed 3 April 2023.
313. N. Mathey (n 23) n° 32. See also M. Aglietta and O. Lakomski-Laguerre (n 30) 103-17, esp. n° 13.
314. D. Plihon (n 18) n° 37.
315. D. Plihon (n 18) n° 38.
316. D. Plihon (n 18) n° 38ff.
317. T. Bonneau (n 33) 1007.
318. Compare with C. Pommier, V. Mamelli and A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 1 – La présentation des actifs numériques, Chapitre 1 – Le développement de la cryptoéconomie' in *Rapport du 117e Congrès des notaires de France*, 2021, N° 2-25 <https://rapport-congresdesnotaires.fr/2021-rapport-du-117e-congres/2021-co2-p1-t2-st1-c1/#ftn0031> accessed 4 March 2023, mentioning stablecoins that would not be backed by any asset but by a smart contract that could ensure the stability of their value.
319. In general on that project, M. Pilkington (n 30).

Facebook is an example of implementation of a system of stablecoins. That mechanism implied that the cryptocurrency would be backed by assets placed in a reserve composed of funds which would have been invested safely and the possibility for the holders of that cryptocurrency to be reimbursed at any moment with an exchange rate indexed on stable national currencies among which the dollar and the euro.[320] It has been abandoned. Others are being set up. In Colombia, for example, Bitso, a platform for the exchange of that sort of currency, has announced the possibility to directly exchange Colombian pesos with stablecoin USDT, a virtual currency backed by dollar, which has been widely adopted in the country. That openness would answer the increasing interest of Colombians in investing or saving in a stable cryptocurrency, especially now because inflation has reached very high levels.[321] However, technique does not avoid all the risks,[322] which has been noted by regulatory authorities, especially American ones, which call for some wariness and their regulation.[323] Economists have indeed stressed some dangers for the economic system.[324] From the point of view of the characterisation as currencies, the answer can only be uncertain, not because the tool cannot be a value unit generating trust, but because it cannot be an autonomous value unit different from real currencies.[325] Should they be classified as currencies though their characteristics are only due to their link to classic currencies? Are they even still cryptocurrencies, given their dependency on classic instruments?

60. In short, cryptocurrencies either would not be currencies or would not be autonomous ones. That being said, is the issue of their characterisation as currencies, which seems fairly out of reach for cryptocurrencies despite the different conceptions of currency, that decisive in regard to their regulation? The issue is mainly subject to autonomous choices of legal policy.

2. A legal policy for cryptocurrencies.

61. A question of legal policy – Fundamentally, the policy of cryptocurrency framing is more a question of choices of legal policy than the capacity of cryptocurrencies to be characterised as currencies.[326] It has been noted that one of the difficulties of the regulation of cryptocurrencies lies in the circumstance that their being denied currency status entails the

320. A. d'Ornano (n 16) 179. See also on that topic, C. Pommier, V. Mamelli and A. Cazalet, 'Thème 2: Valoriser et transmettre le patrimoine dans le monde numérique, Partie I – Le patrimoine entrepreneurial, Titre 1 – L'identification des actifs numériques, Sous-titre 2 – Les qualifications, Chapitre 1 – Les éléments du débat' in *Rapport du 117e Congrès des notaires de France*, 2021, N° 2-65 <https://rapport-congresdesnotaires.fr/2021-co2-p1-t2-st2-c1/#> accessed 4 March 2023.

321. See on that subject <https://www.semana.com/mejor-colombia/articulo/la-nueva-alternativa-para-que-los-colombianos-ahorren-en-dolares-digitales-como-funciona/202311/> accessed 25 February 2023.

322. T. Bonneau (n 33) 1007. Compare with H. de Vauplane (n 2) n° 3.

323. For the United States, President's Working Group on Financial Markets, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency, *Report on stablecoins*, November 2021 <https://home.treasury.gov/system/files/136/StableCoinReport_Nov1_508.pdf> accessed 4 March 2023. And quoted by G. Gensler, Chair of the US Security and Exchange Commission, Speech 'Kennedy and crypto', Sept. 8, 2022 <https://www.sec.gov/news/speech/gensler-sec-speaks-090822> accessed 4 March 2023, and by G. Gensler, Speech 'Prepared Remarks of Gary Gensler On Crypto Markets Penn Lax Capital Markets Association Annual Conference', April 4, 2022 <https://www.sec.gov/news/speech/gensler-remarks-crypto-markets-040422> accessed 4 March 2023.

324. D. Plihon (n 18) n° 39; M. Aglietta and O. Lakomski-Laguerre (n 30) n° 21.

325. Compare from the perspective of economic analysis, M. Pilkington (n 30) 407-08 showing the project of Libra being an account unit.

326. Compare with T. Bonneau (n 33) 1013.

refusal to grant cryptocurrencies the power attached to currencies as well as the possibility to escape a constraining framework.[327] Many hypotheses mentioned above have revealed this harmful paradox, which confirms the dead-end that the link between characterisation as a currency and regulation of cryptocurrencies is. It supposes – within the context of a reflection on what to do with cryptocurrencies as they may be a method of payment – considering their characterisation as a currency and their payment regime independently.[328] This also entails, as much as is possible, to assume that those mechanisms exist and to think again the existing rules or think about future rules regarding that reality, no matter their classification or not as currencies, which, though fascinating, is still a theoretical issue. Characterising cryptocurrencies as currencies should not precede regulation.

62. What legal policy for cryptocurrencies? – Upon analysis, several characteristics seem to emerge from the political and legal treatment that cryptocurrencies should receive. Some objectives would be part of the general method. First, as has been indicated, being characterised or not as currencies should not be necessary in the building of a payment regime in cryptocurrencies. It seems better that the process be understood regarding its ambitions – realising payments – without which it escapes supervision. Then harmonising, or even standardising regulations seems necessary given the impossibility to locate the process and the insecurity that the enforcement of multiple laws could entail.[329] Indeed, the difficulties of connection to national laws and the fragmentation of legislations – harming legal certainty – have been shown.[330] Lastly, the ill-adaptation of existing rules supposes that a new regime be built, which may consist in elaborating a dedicated *corpus* but could not do without an adaptation of payment substantive law.[331] In addition, other objectives would be related to the desirable content of a law of cryptocurrencies, which are linked to the historical risks and considerations many times raised by the phenomenon, especially the fight against financing terrorism and money laundering, and the necessity to protect the consumer.[332] As to the specific issue of payment, one should take into consideration the specificity of the object – which is neither an instrument that may provide universal discharging power, nor just any object –[333] to adapt the law, in particular to avoid that the practise of payment in cryptocurrencies escape any supervision.

327. Compare with F. Drummond (n 112) n° 8 on financial market law; M. Julienne, 'Le régime civil des actifs numériques: l'exemple du prêt de Bitcoins' (2020) N° 19 *JCP E* 1201, n° 10.
328. Compare with English law, S. Green, 'It's virtually money' in D. Fox and S. Green (Eds), *Cryptocurrencies in public and private law* (OUP 2019) 13, spec n° 2.01, 2.22, 22ff, according to whom private law and private law issues should free themselves from the classic political and economic conception of currency and above all 2.48.
329. Underlining the risk of the multiplicity of applicable texts, A. d'Ornano (n 16) 181. See the criticism of France's choice of legislating alone through the Pacte Act, F. Drummond (n 112) n° 10 and 25.
330. M. Audit (n 2) 679.
331. Compare with F. Drummond (n 112) n° 9, 27 and 30, a criticism on the necessity to legislate specifically in financial law.
332. About the decision of the *Cour d'appel de Montpellier* of 21 October 2021 recognising that the user of a Lithuanian platform was a consumer, M.-E. Ancel, 'Chron. Commerce électronique – Un an de droit international privé du commerce électronique' (2022) N° 1 Communication Commerce électronique, chron. 1, n° 9; T. Bonneau, 'Crypto-actifs, banalisation et Bruxelles 1 *bis*' (2022) N° 1 Revue de droit bancaire et financier, 1; and C. Kleiner, Droit financier international – Chronique de Droit financier international, coord. C. Kleiner, E. Prévost (2022) N° 2 Revue de Droit bancaire et financier, 1, n° 28-29 also mentioning a decision of the Austrian supreme court recognising that the Bitcoin borrower was a consumer.
333. supra n° 51.

63. On the necessity to monitor cryptocurrency platforms – In addition, independently of monetary characterisation, the issue of the traceability and supervision of operations relating to cryptocurrencies is fundamental. That is why in Colombia, for example, the Information and Financial Analysis Unit (IFAU) adopted Resolution N° 314 in 2021,[334] which was enforced in July 2022, whereby, following the FATF recommendations to fight against terrorism and money laundering, the obligation for the platforms of exchange of crypto-assets to inform the IFAU on the transactions realised on virtual assets was sanctioned.[335] That obligation is imposed on any legal or natural person exercising, for another, activities linked to the exchange of virtual assets and fiat currencies, exchanging, transferring or keeping virtual assets and, generally speaking, any service linked to that type of asset.[336]

64. On the necessity to take into account the adoption of Bitcoin as a currency having legal tender in Salvador and the Central African Republic – Salvador was the first country to adopt Bitcoin as legal tender, via Decree 57 of 9 June 2021,[337] which was enforced on 7 September 2021. Thus, it is provided that any economic agent should accept Bitcoin as a method of payment[338] or that it is possible to quote prices in Bitcoin[339] and to pay one's taxes using that currency.[340] The Government of the Central African Republic has regulated, in Act N° 22.004 of 22 April 2022,[341], the use of cryptocurrencies in the country and has provided that Bitcoin would be considered as a reference currency.[342] Consequently, it is provided that 'any economic agent has to accept cryptocurrencies as a method of payment when they are offered for the purchase or the sale of a good or a service'.[343] Similarly, the National Regulatory Agency of Electronic Transactions has been created to supervise and manage all the digital transactions and cryptocurrencies.[344] Independently on whether it is relevant or not to characterise cryptocurrencies as currencies, what is sure today is that at least two countries admit one of the most important cryptocurrencies – Bitcoin – as legal tender. Thus, it does not seem possible to disregard that circumstance and the impacts it could have, at least from the point of view of the characterisation of cryptocurrencies as foreign currencies.[345]

65. The phenomenon of cryptocurrencies poses many challenges. What evolutions of the control of cryptocurrencies are to be expected? Are those evolutions likely to meet the theoretical and political foundations that must guide the control of that phenomenon?

334. That resolution is available at <https://incp.org.co/wp-content/uploads/2022/01/Resolucion-314.pdf> accessed 26 February 2023.
335. Art. 4 of Resolution N° 314 of 2021.
336. Art. 1 of Resolution N° 314 of 2021.
337. Decree 57 of 9 June 2021 available at <https://cdn.inclusionfinanciera.gob.sv/wp-content/uploads/2021/06/Ley-Bitcoin.pdf> accessed 25 February 2023.
338. Art. 7 of Decree 57 of 9 June 2021.
339. Art. 3 of Decree 57 of 9 June 2021.
340. Art. 3 of Decree 57 of 9 June 2021.
341. Act N° 22.004 of 22 April 2022 <http://www.droit-afrique.com/uploads/RCA-Loi-2022-04-cryptomonnaie.pdf> accessed 25 February 2023.
342. In that sense, Art. 1 of Act N° 22.004 of 22 April 2022.
343. Art. 10 of Act N° 22.004 of 22 April 2022.
344. Art. 13ff of Act N° 22.004 of 22 April 2022.
345. In that sense, even before the recognition of Bitcoin as legal tender in Salvador and the Central African Republic, on the ground of the use of cryptocurrencies as international exchange instruments: A. Gámez Rodríguez (n 60) 215-16.

B. The future of the framing of cryptocurrencies

66. There are many new regulations and technical innovations in that matter. The control of cryptocurrencies may evolve in two different fields: the regulations of cryptocurrencies issued by private operators which is about to be reinforced (1) and the projects of creation of digital currencies which would be issued by central banks (2).

1. The projects and new regulations of cryptocurrencies issued by private operators

67. French law and Colombian law admit that the regulation of cryptocurrencies must be specific. In that sense, different projects are being elaborated or are about to be implemented. It is necessary to analyse them to determine their capacity to meet the challenges posed by cryptocurrencies. We will first examine those projects and new regulations in French and European law (a) then in Colombian law (b) before presenting recent evolutions in international law (c).

a. In European and French law

68. New European regulations – The European legislator has seized the need to regulate crypto-assets directly in the Proposal for a Regulation on Markets in Crypto-Assets (MiCA), adopted by the European Parliament and the Council on 24 September 2020.[346] That project has the merit of providing uniform rules aiming to supervise the issuance and use of crypto-assets and to offer increased protection to users.[347] Implementing a European regime would favour cross-border operations for which crypto-assets could be used.[348] That harmonising logic seems necessary,[349] even if it has been noted that crypto-asset companies are mainly outside the European Union.[350] The proposal of regulation frames different categories of crypto-assets.[351] The 'asset-referenced tokens' are subject to a regulation allowing to curb the risks they pose as to the stability of the system and to limit their volatility.[352] The issuers of those tokens must, among other obligations, get an authorisation.[353] The issuers of 'e-money tokens' – which correspond to crypto-assets backed by one currency having legal tender –[354] are regulated in the proposal. Those two categories allow to regulate the practice of stablecoins,[355] which is the most likely to be used and generalised as a method of payment. To that, it may be added that the regulation proposal imposes that a service provider of crypto-assets which offers payment services is a payment institution in the sense

346. Proposal for a Regulation of the European Parliament and of the Council *on Markets in Crypto-assets, and amending Directive (EU) 2019/1937* <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:52020PC0593> accessed 18 March 2023. See T. Bonneau (n 33) nº 506.16, 1005-06.
347. T. Bonneau, 'Marchés des crypto-actifs, Le 'Digital finance package' (2021) Nº 1 Revue de Droit bancaire et financier, Study 1, nº 8. See Proposal for a Regulation (n 342) Art.1, 38.
348. ibid, 6 and Recital 76, 36.
349. ibid, 8-9. See supra nº 61.
350. P. Storrer (n 5) 7, nº 4.
351. T. Bonneau (n 347) nº 10.
352. Proposal for a Regulation (n 342) Recitals. 36ff, 26ff, and esp. Art. 31 and 32 of those texts on the obligation to constitute own funds and asset reserves, 67ff.
353. ibid, Article 15, 53. See on all the obligations they have, T. Bonneau (n 347) nº 15ff.
354. Proposal for a Regulation (n 342) Recital 9, 20 and Art. 3, 40 for their definition. About their regime, T. Bonneau (n 347) n 22ff.
355. On the chosen directions on that matter, Proposal for a Regulation, 342, 8ff.

of Directive EU Nº 2015/2366.[356] The text was signed on 31 May 2023 by the President of the European Parliament and the President of the Council and published on 9 June 2023 in the Official Journal of the European Union.[357] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 *on markets in crypto-assets, and amending Regulations (EU) Nº 1093/2010 and (EU) Nº 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937* was enforced on 29 June 2023 and will be applicable, with some exceptions, on 30 December 2024.[358] As previously indicated, it establishes three main types of crypto-assets: 'e-money tokens', which are backed by one official currency, 'asset-referenced tokens' and crypto-assets other than those belonging to the first two categories.[359] It imposes on provider institutions to submit to approval procedures[360] and establishes use monitoring to ensure that those uses do not threaten the system, in particular tokens 'with a significant importance'.[361] However, it does not mention specific expectations as to payment law as such. In addition, on the same day, the above-mentioned Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023[362] *on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849*[363] was adopted and also published on 9 June 2023.[364] The definition of crypto-assets is made through reference to that which was made in Regulation 2023/1114 (MiCA) of the same day.[365] The latter imposes on payment service providers and providers realising transfers of crypto-assets an obligation to collect a certain amount of information on the purchaser and beneficiary, to ensure the traceability of operations and limit the financing of illegal activities.[366] Pursuant to its Article 40, that system aims to be applicable on 30 December 2024.

69. In French law – In France, domestic law is no longer intended to evolve autonomously given the advent of Regulation MiCA. One will note however that the recent enactment of Act Nº 2023-171 of 9 March 2023 *introducing different provisions in line with European law in the fields of the economy, health, employment an agriculture*, which authorises the Government to legislate by decree to adapt the Monetary and Financial Code and other codes

356. ibid, Art. 63, 97.
357. Official Journal of the European Union 09/06/2023, L150, 40 <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=OJ:L:2023:150:FULL> accessed 5 July 2023.
358. Regulation (EU) 2023/1114, n 44, Art. 149.
On the website of the AMF 'Marché des crypto-actifs: publication du règlement européen MICA' <https://www.amf-france.org/fr/actualites-publications/actualites/marches-de-crypto-actifs-publication-du-reglement-europeen-mica> accessed 4 July 2023.
359. Regulation (EU) 2023/1114, n 44, (18).
360. ibid, (43).
361. ibid, (102) ff.
362. supra nº 51.
363. <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32023R1113#d1e1276-1-1> accessed 5 July 2023.
364. Official Journal of the European Union, n 353, 1.
365. Regulation (EU) 2023/1113, n 241, (10).
366. <https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:32023R1113#d1e1276-1-1> accessed 6 July 2023.

to Regulation MiCA[367] and modifies the regime of service providers on digital assets, as regulated by the Monetary and Financial Code under Articles L. 54-10-1 and following, and especially to establish a transition regime until Regulation MiCA, is enforced.[368] Those measures are auspicious and should allow better supervision of crypto-currencies. However, they must ensure the adaptation of payment law too: the authorisation provided for in Act N° 2023-171 of 9 March 2023 seems to allow for it.

b. In Colombian law

70. The first attempts at regulation – Among the different attempts to regulate cryptocurrencies, two of them were put aside a few years ago already – Bills 020 of 2018[369] and 268 of 2019.[370] Though those two texts are no longer relevant, they are important as they expressly provided that crypto-assets were not legal tender for lack of support from the Government and the Central Bank. In addition, they acknowledged the need for regulating cryptocurrencies precisely because of the fast-growing phenomenon and the necessity to control those operations in order to mitigate the dangers linked to their being used to finance terrorism and launder money. Similarly, technological, cyber and fraud risks specific to operations in cryptocurrencies were mentioned to insist on the volatile nature of that market and consequently justify an obligation of information on platforms offering that type of services, and in favour of the consumer.[371] None of the two bills made any particular reference to payment in cryptocurrencies or to its consequences.

71. The creation of a regulatory sandbox – Similarly, it is to be noted that in May 2020 a regulatory sandbox[372] called 'La Arenera' was implemented by the Financial Superintendence and aimed to test and support new financial services or business models, exercised in real conditions and subject to framing and a particular supervision. Within that framework, many financial entities tested several business models and the risks linked to the use

367. Art. 9 of Act N° 2023-171 of 9 March 2023: 'I. – Under Article 38 of the Constitution, the Government may, within one year from the promulgation of this Act, take any measure by order in the area falling under this Act to:
1° Adapt the provision of the Monetary and Financial Code and, if need be, other codes or acts to ensure, upon enforcement of the Regulation of the European Parliament and of the Council on crypto-asset markets approved by the Council of the European Union on 5 October 2022, their consistency and compliance with that regulation;
2° Define the competences of *Autorité des Marchés Financiers* and *Autorité de Contrôle Prudentiel et de Résolution* as to the application of that regulation.
II. – A ratification bill will be introduced in Parliament within three months of the issuance of the decree mentioned at I.'

368. Art. 8 of Act N° 2023-171 of 9 March 2023.

369. The text of the bill is available at <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2018-2019/1146-proyecto-de-ley-020-de-2018> accessed 13 February 2023.

370. The text of the bill is available at <http://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2018-2019/1429-proyecto-de-ley-268-de-2019> accessed 13 February 2023.

371. Pursuant to Articles 5 and 6 of Bills 020 of 2018 and 269 of 2019, respectively, the platforms making operations in cryptocurrencies are under the obligation of informing consumers of the currencies' lack of monetary status and of the risks linked to those operations.

372. In Colombia, thanks to Decree 1732 of 2021 of the Ministry of Commerce, Industry and Tourism, the Government has authorized the creation of a sort of experimental space or environment called 'sandbox' to test innovating business models. Pursuant to Article 2.2.1.19.1.3 of the decree, the sandbox is defined as a 'sort of exploratory regulatory mechanism, allowing companies to test innovating products, services and economic models without being immediately subject to all the normal regulatory consequences of the activity in question'.

of virtual currencies under the monitoring of the Financial Superintendence.[373] Similarly, different deposit and withdrawal operations were realised with platforms of exchange of crypto-assets (exchanges) and via products of deposits of monitored entities, which demonstrated the possibility to manage risks specific to the operations involving virtual assets.

That pilot project ended in October 2022 and is still being assessed. However, that also allowed the Financial Superintendence to prepare a draft circular on the establishment of links between, on the one hand, providers of virtual asset services, and, on the other, the financial system, in order to allow the development, by the monitored entities, of operations involving virtual assets.[374] Similarly, in that draft circular, the Superintendence provides that the providers of virtual-asset services must meet some conditions to interact with banking institutions, among which, for example, an administrative system to manage the risk of money laundering, technological and operative capacities to realise the traceability of transactions in virtual assets, etc.

It is to be underlined that the monitored entities have a duty of information towards consumers so that the latter must be made aware that they are the only one to bear the risks posed by operations involving virtual assets. Another important aspect of that draft circular is that it reasserts the non-monetary nature of cryptocurrencies while noting the absence of unlimited discharging power. Similarly, it underlines that cryptocurrencies are neither foreign currencies nor financial assets. Lastly, it is provided that the entities under supervision cannot realise operations for themselves, which explains why it is impossible for them to include those operations into their statements of account.[375]

72. The latest attempt at regulating – After the two projects were put aside, another bill was presented to legislate on crypto-assets. Even though there only remained one debate for it to be definitely adopted, it was eventually also put aside, against all odds.[376] It was Draft Bill 139 of 2021, in which the word 'cryptocurrencies' was abandoned and 'crypto-assets' preferred. The latter were defined as virtual assets designed to be used as a means of exchange of goods and services, even though it was underlined that they are neither legal tender, nor a foreign currency, nor a representative title of legal tender.[377] Article 2(a) provided that crypto-assets are immaterial or fungible goods integrating the estate, that may have a value and lead to the getting of an income. In addition, it was underlined that it was not a recognised currency having legal tender. The crypto-assets nature as intangible assets was highlighted. In the same way as in the two previous projects put aside before, this project was silent on payment in cryptocurrencies and its consequences.

73. Beyond the denial that cryptocurrencies are currencies – The last bill was probably shelved because it was not one of the legislative priorities, in a context of other large-scale bills[378] but also because of the wish to enrich the existing proposal with contributions of the Bank of the Republic and the Government. Despite this shelving, the authors of the bill

373. See about the regulation and operation of that sandbox <https://www.superfinanciera.gov.co/jsp/10106586> accessed 15 November 2022.
374. See on that bill <https://img.lalr.co/cms/2022/07/15093434/ABC_proynorma17_22.pdf> accessed 13 February 2023.
375. The draft circular is available at <https://img.lalr.co/cms/2022/07/15093434/ABC_proynorma17_22.pdf> accessed 10 February 2023.
376. See on that issue <https://es.beincrypto.com/colombia-archivan-proyecto-ley-regular-exchanges/> accessed 4 August 2023.
377. Art. 2 of the bill.
378. Eg the reform of Health, see on that issue <https://es.beincrypto.com/colombia-archivan-proyecto-ley-regular-exchanges/> accessed 4 August 2023.

intend to introduce it again in the coming months, with the bill that has been withdrawn serving as a basis for the new one.[379] Thus, because of the direction of the above-mentioned attempts at regulation, it is possible to note that there is a tendency of the Colombian law to follow the positions and recommendations of the administrative authorities and in that sense deny that cryptocurrencies are currencies, and, consequently, deny they have legal discharging power. Beyond that perspective, it is possible to observe that the legislator was mainly interested in protecting the consumer. Thus, the idea is to recognise the national or international Crypto-Asset Trading Platforms (CATP) known as exchanges providing trading services of virtual assets on the Colombian territory. To be recognised, the CATPs, which would be either national or foreign, would have to be commercial companies or foreign entities belonging to the same economic group and legally linked to the CATP residing on the national territory, and would in addition have to register with the mercantile register. Similarly, the creation of a Unique Register of Crypto-Asset Trading Platforms has been planned and should be conducted by the chambers of commerce.[380] In that manner, the legislator seems to be trying to ensure that all the crypto-asset platforms will be linked to the Colombian territory which would facilitate the application of Colombian law in case of litigation. The establishment of a legal framework for those platforms may also help to solve the issue of the above-mentioned difficulties of proving payment in cryptocurrencies,[381] for, under Article 4 (h), the CATPs would have to keep a record of transactions.

In addition, those platforms would have to adopt supervising measures aiming to detect and prevent money laundering and the financing of terrorism.[382] They would also have to report to the IFAU and establish know-your-client and due diligence measures. All those requirements in the end tend to create a legal framework for the functioning of the CATPs and to ensure some security for customers, even though it is not absolute. Indeed, as was established in the last bill, the supervisory functions of the State do not imply that the latter protects against the risks inherent to the operations involving crypto-assets. Given that their value depends on supply and demand on the market based on the type of asset, each user assumes the risk of gains and losses due to the volatility and unforeseeable nature of those crypto-assets.[383]

Thus, several provisions imposed different obligations on the platforms providing crypto-asset related services, for example that of informing users that crypto-assets are not legal tender and are consequently not backed by the State.[384]

74. Uncertainty as to the relation between cryptocurrencies and foreign currencies – Another aspect on which the last bill was silent, despite its importance, was that of the possibility to consider cryptocurrencies as foreign currencies. As was underlined above,[385] the fact that at least two countries have recognised Bitcoin as an official currency should lead to a taking of position on the matter. Uncertainty is all the more important regarding Bills 268 of 2019[386] and 139 of 2021 in its original version.[387] Indeed, those two texts, upon

379. See on that topic <https://www.portafolio.co/economia/finanzas/criptomonedas-en-colombia-proyecto-se-presentara-en-julio-584966> accessed 4 August 2023.
380. Art. 4 (a) of Bill 139 of 2021.
381. supra nº 50.
382. Art. 4 (c) of Bill 139 of 2021.
383. In that sense Art. 5 (d) and (e).
384. Art. 5 (a).
385. supra nº 63.
386. In that sense Art. 2 (b).
387. In that sense Art. 2 (a).

giving a definition of crypto-assets, expressly provided that they were neither legal tender nor foreign currencies, nor representative titles of legal tender. Would the deletion of the provision which denies that cryptocurrencies are foreign currencies mean that the legislator has thought about granting them such a status? The adopted position is not insignificant regarding Article 86 of External Resolution 1 of 2018. Indeed, it would be possible to admit that the parties may stipulate an obligation in Bitcoin, which would be considered as a monetary obligation, precisely because the monetary nature of Bitcoin has been recognised by Salvador and the Central African Republic. Another issue would be to determine in which currency – Bitcoin or peso – the obligation should be paid. If it is considered to be an international operation, the obligation should be paid in Bitcoin. If it is not, the obligation should be paid in pesos. The difficulty would lie in the establishment of an exchange rate that would be representative of the market to realise the conversion. Pursuant to above-mentioned Article 86, the conclusion would be that the rate would be that of the day when the obligation was entered into, except stipulation to the contrary. However, Article 7 of Bill 028 of 2018 went into a different direction and provided that the exchange rate would be that of the day the obligation was performed, unless the parties stipulated otherwise. In addition to national projects, an international answer is being expected.

75. Independently of the differences in the direction of European, French and Colombian projects, one could note that they endeavour to regulate crypto-assets in a general way without differentiating among cryptocurrencies, which may be a drawback when cryptocurrencies have particular features that would warrant a specific approach.

c. International law projects

76. Unidroit principles – Different international bodies have studied the issue of cryptocurrencies.[388] In particular, Unidroit, in partnership with a certain number of institutions, published a working document in January 2023[389] which was subject to a public consultation. That document is designed to provide useful precisions to determine the regulation applicable to operations related to digital assets, which is a crucial issue, as has already been noted.[390] The project provides a certain number of substantial principles[391] which prevail over national laws[392] and it would encompass all sorts of transfers of digital assets,[393] including digital assets backed by other assets.[394] Above all, the project contains a conflict-of-laws mechanism which results in the national law being applicable on the matter of the ownership of digital asset when the digital asset expressly provides that the national law applies to that question, or, absent such a provision, if that national law is expressly provided for by the system or the platform on which the asset is recorded, or, in still other cases, by other

388. Interview by D. Legeais and H. de Vauplane (n 276) 6.

389. *Draft Unidroit Principles on Digital Assets and Private Law*, Unidroit 2023, Study LXXXII – PC, January 2023 <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/> and <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/digital-assets-and-private-law-public-consultation/> accessed 4 July 2023.

390. supra nº 16.

391. D. Legeais, 'Actifs numériques, En attendant MICA, voici Unidroit!' (2023) Nº 2 Revue de Droit bancaire et financier, repère 2.

392. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 3, 14.

393. ibid, Principle 2, 8. On that point, J. Chacornac, 'L'émergence d'un cadre international pour les actifs digitaux', Droit bancaire et financier international (2023) Nº 208 Banque & Droit, 73, esp. 74.

394. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 4, 17.

mechanisms of determination of the applicable law.[395] It is quite beneficial that that text offers a mechanism to determine the enforceable law but one may wonder about the clarity of the chosen criteria, in particular that of the foreseeability of the applicable law 'in the digital asset',[396] as what it covers is not clear at once. For that matter, an author has observed that the selected method consists in renouncing the connection that would result from the location of the thing, which may have been considered a 'failure'.[397] One may also wonder about the place of payment in cryptocurrencies in that regulation project. Admittedly, cryptocurrencies, and especially, as mentioned above, cryptocurrencies backed by other assets, are included into the field of applicable principles. However, one will note that, more than the specific objective of payment by those crypto-assets – the issue of the validity of transfers being excluded from their field of application –[398] the substantial principles are about some issues related to the ownership of assets.[399] In addition, within the framework of that project in which it participates and from the perspective of an on-going joint work, the Hague Conference on Private International Law has completed the working document of Unidroit: it stresses, among other things, the difficulties in determining the law in the considered field, because it is impossible to identify the users who act with a pseudonym and to locate the platforms, even though it states that the classic linking methods may be efficient in some situations.[400] Eventually, the project was adopted. Indeed, the Governing Board adopted the Unidroit principles as to digital assets on 10 May 2023.[401] The digital assets that may be monitored[402] – among which cryptocurrencies and currencies issued by central banks,[403] insofar however as there are private-law issues – are within the field of those principles.[404] The rule of conflict of laws that has been ratified shows, as noted previously about the working document, the rejection of the criterion of connection that would be based on the location of the asset,[405] even though the connecting criteria have been modified to additionally include that of the headquarters of the issuer.[406] That project improves the framework applicable to transactions realised in crypto-assets, but it is still too little specific as to issues of payment and may be perfected. Beyond, a main datum may change the landscape – the advent of digital currencies issued by central banks.

395. ibid, Principle 5, 21.
396. ibid, Principle 5, 21: '*(a) the domestic law of the State, excluding that State's conflict of law rules, expressly specified in the digital asset as the law applicable to such issues.*'
397. J. Chacornac (n 393) 75.
398. Draft Unidroit Principles on Digital Assets and Private Law, Unidroit 2023, Study LXXXII – PC, January 2023, Principle 3, (3) (b), and developments nº 10, 4.
399. J. Chacornac (n 393) 75, mentioning 'in the end a modest content'.
400. HCCH Proposal for joint work, HCCH-Unidroit Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens, Prel. Doc. Nº 3C of January 2023, CGAP, March 2023, 4-5.
401. 'Adoption des principes d'Unidroit sur les actifs numériques et le droit privé lors de la 102e session du Conseil de direction' <https://www.unidroit.org/fr/adoption-des-principes-dunidroit-sur-les-actifs-numeriques-et-le-droit-prive-lors-de-la-102eme-session-du-conseil-de-direction/> accessed 5 July 2023.
402. *Adoption of Draft Unidroit Instruments (c) Principles on Digital Assets and Private Law*, Governing Council, 102nd session, 10-12 May 2023, Principle 2. On that point, J. Chacornac, 'L'émergence d'un cadre international pour les actifs digitaux' in Chronique Droit bancaire et financier international, Banque et Droit Nº 208, March-April 2023, 73, esp. 74.
403. *Adoption of Draft Unidroit Instruments (c) Principles on Digital Assets and Private Law*, Governing Council, 102nd session, 10-12 May 2023, 2.8ff.
404. Compare with J. Chacornac, 'Principe 5: conflit de lois' (2023) Nº 4 Revue de droit bancaire et financier, File 25, nº 23.
405. ibid nº 7.
406. ibid nº 12.

2. The project of creating digital currencies issued by central banks

77. The project – Framing cryptocurrencies is not enough when the needs that the process seems to cover are not satisfied. Different State institutions have therefore considered creating their own cryptocurrencies. Those digital currencies of central banks would serve not only for interbank settlements but also for payment between users.[407] That project has developed around the globe and in Europe.[408] The *Banque de France* and European institutions are testing that process.[409] Several issues may be raised.[410] However, that currency would be based on the idea that it is possible to fulfil the needs for the digitalisation of payment and speed of transactions which support using cryptocurrencies, with the advantage of the stability provided by the State issuer.[411] Beyond the control of cryptocurrencies, the Colombian Government is also considering creating a digital currency, the digital peso, even though this may not be a short-term project.[412] The objective seems to be facilitating payment operations and monitoring tax evasion. The digital peso would thus be included into the category of electronic money and not that of cryptocurrency.[413]

78. What future for cryptocurrencies after the digital ones issued by central banks? – The phenomenon is interesting. For the State institutions it would be a case of putting themselves beyond regulation and 'play on the field of technical innovation'.[414] That could be compared to the historical observation that the State appropriated the new methods of payment established by private initiatives after they were launched.[415] But beyond that, what could it say about future transformations? The impact of the digital currencies issued by central banks on the banking system may also give rise to questions.[416] In particular, one cannot but see the sign of inherent weaknesses of the cryptocurrency projects – which do not seem to be compensated outside a State intervention – and wonder whether the incorporation of the process by State institutions may not precisely cause their fall.

79. Conclusion on the prospective law of cryptocurrencies – Cryptocurrencies do not seem to be designed to become currencies, for lack of having the latter's characteristics. That denial of characterisation, which, paradoxically, allows cryptocurrencies to escape the constraining framework that is imposed on payments, should not however be an obstacle to the

407. M.l Aglietta and O. Lakomski-Laguerre (n 30) n° 26.
408. C. Kleiner, 'Chronique de droit bancaire international' (2021) N° 5 Revue de droit bancaire et financier, n° 9, 2; M. Pilkington (n 30) 409. See also on that topic, H. de Vauplane (n 2) n° 4 in general and noting that the scope of different central-bank currencies could be limited to their territory.
409. <https://www.banque-france.fr/communique-de-presse/la-banque-de-france-participe-une-nouvelle-experimentation-de-monnaie-numerique-de-banque-centrale> accessed 1st April 2023. At the European level <https://www.ecb.europa.eu/paym/digital_euro/html/index.fr.html> accessed 1st April 2023; H. de Vauplane, 'Un euro numérique est-il légal?', Revue d'économie financière, 2023/1, N° 149, 121, esp. 121.
410. H. de Vauplane (n 66) 121 and, generally, studying the possibility to found the issuance of an e-euro on the treaties and especially on their definition of the competences of the European Central Bank and examining the issues raised by granting those digital currencies currency status.
411. Compare with M. Aglietta and N. Valla (n 259) esp. n° 60-62.
412. <https://www.portafolio.co/economia/finanzas/gobierno-crearia-moneda-digital-en-colombia-segun-director-de-la-dian-569621> accessed 22 February 2023.
413. See on that difference supra n° 4.
414. M. Aglietta and O. Lakomski-Laguerre (n 30) n° 24.
415. On that observation, R. Libchaber (n 71) n° 73. On that topic, supra n° 54.
Compare with B. Courbis (n 117) 33: 'Currency is a phenomenon with an unquestionable political dimension, but it is not always imposed by the State on the economy, it results from the continuous play of the spontaneity of trade innovations and rule setting of the political power.'
416. D. Plihon (n 18) n° 39; M. Aglietta and O. Lakomski-Laguerre (n 30) n° 25, 27; M. Pilkington (n 30) n° 414.

building of a legislation on cryptocurrencies which should rely on legal policy guidelines rather than theoretical considerations. The projects, in European and Colombian law, seem to follow that approach and fundamentally provide increased framing of crypto-assets. Similarly, the mechanisms of conflict of laws seem to be being specified. Those are positive aspects. One will regret that payment law – which has been demonstrated to be ill-adapted for not clearly welcoming conventional payment in cryptocurrencies and providing specific protection to its users – is not the subject of arrangement projects yet.

80. General conclusion – Given the state of the law at least in France and Colombia, cryptocurrencies may not be a legally and universally recognised method of payment but only a conventional one, as the Court of Justice of the European Union and the regulatory administrative authorities in Colombian law admit. Upon analysis, cryptocurrencies do not seem to have a discharging power with an unlimited, general or universal scope. However, they undoubtedly have a conventional power to discharge which is superior to other goods and which could be called intermediary. In reality, they are designed or aim to fulfil some functions of a currency without being able to be called so. However, paradoxically, on the one hand, their being recognised as a conventional method of payment comes up against a law of payment that is ill-adapted,[417] while, on the other, their being denied the right to be called a currency has placed them in a less monitored position, though the clear ambition of issuers and users is to escape the States' yoke, which is not desirable. Those elements justify that cryptocurrencies be the subject of a new specific legislation which may be autonomous from their being characterised as currencies, unattainable in several respects. From many points of view, it is that stage that European and Colombian legislators are working on with, respectively, the advent of the MiCA Directive, and the probable introduction of a new bill aiming to regulate crypto-assets even though they remain silent on important issues. The question of the applicable law, which is fundamental, should be determined within the Unidroit Framework. The specific issue of the adaptation of payment law, which is essential to allow cryptocurrencies to play even a marginal role as a method of payment, seems for the moment neglected. The admission of the mechanisms should be made compatible with legal restrictions in matters of currency and methods of payment and, beyond that, should rely on clear foundations and characterisations and be included into a framework protective of users. What could be imagined as to the future of cryptocurrencies in matters of payment? Beyond the fact that they are not characterised as currencies, the process does not seem to offer the guarantees necessary to generate trust in users and to their being generalised. The initial project – offering a decentralised payment system, independent of State institutions and universal – which was first and foremost a political one, seems more or less to be fading away. The supervisory intentions of the States have had some impact on that, as well as the technical limits that are inherent in the process. Then, like the Lernaean Hydra which died from its own poison, the system of cryptocurrencies could very well, on the issue of payment, be limited by its own weaknesses: an ambition politically and technically unrealisable. There are still some unknown factors linked to the current economic and political situation which may vary depending on the territories. In particular, the admission of Bitcoin as legal tender in Salvador and the Central African Republic, as well as its being accepted in an increasing number of countries, may change the situation. Moreover, could Salvador's recent announcement of the payment of an important part of its external debt, without the help of the IMF and despite all the negative previsions due to

417. supra nº 51 and 78.

the adoption of Bitcoin as legal tender, give cryptocurrencies unforeseen help? The achievement of the project of a payment cryptocurrency remains dependent on a legislation that may welcome it, which, as the latest legislative news shows, is not simple. The outcome of the project will definitely be political[418] and global.

418. Compare with H. de Vauplane (n 66) 124: 'E-euro is first and foremost a political issue and not a technical one'.

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TAKING EU PRODUCT LIABILITY LAW SERIOUSLY: HOW CAN THE PRODUCT LIABILITY DIRECTIVE EFFECTIVELY CONTRIBUTE TO CONSUMER PROTECTION?

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The 1985 Product Liability Directive (PLD) is currently being revised, with a view to adapting European Union product liability rules to the digital economy and new technologies. The ongoing discussion focuses on technical issues and apparently takes it for granted that the PLD as it stands adequately achieves the policy goals that were initially assigned to it, namely the establishment of a common market and consumer protection. However, a closer analysis shows that harmonising product liability is not needed to create a truly common market and, more importantly, that the PLD is not an effective instrument for consumer protection. A particular cause for concern is that almost no cross-border claims seem to be brought under the Directive, meaning that those injured by defective products are in effect left without a remedy when the producer is not located in the same country as they are. If the new PLD is to be more than mere poster legislation and to contribute effectively to consumer protection, more drastic changes to the current regime are needed than those that are currently being contemplated. The range of potential defendants should be broadened to include suppliers and online marketing platforms as a matter of principle, and the development risk defence as well as the application of a long-stop period in case of bodily injuries should be reconsidered.

I. Introduction[2]

Product liability can be defined as liability in damages for damage caused by products. Such damage is as old as products themselves, but product liability established itself as an iden-

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2. This article was written in May 2023 during a research stay in Oxford, where I was hosted by the Maison Française d'Oxford and the Institute of European and Comparative Law. I wish to thank Profs Pascal Marty and Matthew Dyson, the directors of these institutions, for their hospitality and support. I am also thankful to Solène Semichon from Université Paris-Panthéon-Assas for correcting my English where necessary.

tified and discrete legal topic in the 1960s in most European countries, partly under the influence of the United States (US) and at a time when the number of consumer products in circulation, as well as the number of accidents they caused, was rising sharply.[3] Damage caused by products was then handled with the 'traditional' rules of contract or tort law, often based on fault. However, there existed a strong doctrinal movement favouring a shift from traditional fault-based liability to strict liability[4] or even no-fault compensation schemes. Strict liability for products appeared to many as particularly desirable, especially in view of the tragedies caused by certain products like Thalidomide/Contergan and of legal developments across the Atlantic.[5] It had established itself as the new standard in the US after landmark decisions by the California Supreme Court[6] and the adoption of the Second Restatement of Torts.[7] Academics and courts in different European countries therefore struggled to suggest or develop specific rules on product liability that would make compensation easier. Yet, despite significant evolutions in some countries, the state of the law across Europe generally appeared as patchy and unsatisfactory.[8]

It was in this context that the then European Economic Community (EEC), with its fresh interest in consumer protection,[9] decided to make its first foray into the field of tort law and to establish a harmonised strict product liability regime. This was primarily a political move, but it also made sense from a purely legal perspective, allowing to get several birds stoned at once. For claimants (mostly consumers), strict liability would be an improvement on fault liability. The new regime would achieve what lawyers in several Member States had been trying to do, while at the same time putting the EEC at the forefront of legal innovation. Moreover, European harmonisation appeared as a way to address the international dimension of product liability issues, perhaps best exemplified by Thalidomide/Contergan.[10] However, the realisation of that project proved more difficult than expected.[11]

3. J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 149-50; S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 3-9.
4. In this article, as is commonly the case, 'strict liability' will be understood as liability not based on fault, the latter being understood as the breach of a duty to act or not to act in a certain way. See eg J. Stapleton, 'The conceptual imprecision of "strict" product liability' (1998) 6 Torts Law Journal 260; M. Cappelletti, *Justifying Strict Liability* (OUP 2022) 1. While this conception of strict liability seems rather uncontroversial, one should be aware that 'fault' is not understood in the same way in all legal systems (nor at times within one legal system) and is therefore a particularly ambiguous concept in the context of transnational legislation or comparison: M. Dyson, *Explaining Tort and Crime. Legal Development Across Laws and Legal Systems, 1850-2020* (Cambridge University Press 2022), esp. 220-96; S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 632-40.
5. Which were known in Europe mostly through German scholars: J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 430.
6. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P. 2d 436 (1944); *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 2d 57, 377 P. 2d 897, 27 Cal. Rptr. 697 (1963). See also *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).
7. Restatement (Second) of Torts (1965), Section 402A: '(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'
8. S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 20-23.
9. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 433.
10. ibid 432.
11. J.-L. Fagnart, 'La directive du 25 juillet 1985 sur la responsabilité du fait des produits défectueux' (1987) Cahiers de droit européen 3, § 5.

A first draft was published in 1976,[12] but it took nearly one decade before Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (the PLD) was eventually adopted.[13] The main reason for the delay was the reluctance of some Member States to move away from fault-based liability, and the fear that this would endanger the economy, by imposing too strong a financial burden (and potentially an unfair one) on industrial firms. The debate crystallised on the issue of the so-called 'development risk' defence, which allows producers to escape (strict) liability if they could not be aware of the risk posed by their products at the time when they were put into circulation.[14] In the end, a compromise was found, which included introducing the defence but allowing Member States to opt out, as well as enabling them to set financial caps on liability, as was then traditional for strict liability regimes in some countries.

In a nutshell, the PLD imposes liability on producers for damage caused by a defect in their product (Article 1). For the purpose of the Directive, a product is any movable, even though incorporated into another movable or into an immovable, and including electricity (Article 2). The producer is defined as the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting their name, trademark or other distinguishing feature on the product presents themselves as its producer (Article 3(1)). Any person importing the product into the EU can also be made liable (Article 3(2)). Where the producer or the importer cannot be identified, each supplier of the product shall be treated as their producer unless they inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product (Article 3(3)). According to the PLD, a 'product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account' (Article 6(1)). The types of damage that can be compensated are bodily injuries and – subject to a lower threshold of € 500 – damage to property, provided the item of property (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption (Article 9(1)). It is for the injured person to prove the damage, the defect and the causal relationship between defect and damage (Article 4). If they do so, various defences are available to the producer, including the existence of a 'development risk' (Article 7). Finally, two limitation periods are applicable to claims under the PLD: a three-year period running from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer (Article 10(1)); and a ten-year 'long-stop' period running from the date on which the producer put into circulation the actual product which caused the damage (Article 11).

Liability under the PLD is regarded as strict, since it is based on the product's defectiveness, and not on the producer's or someone else's fault. The definition of defectiveness given at Article 6 is strongly reminiscent of the 'consumer expectations' test put forward in the Second Restatement of Torts[15] and testifies to the US influence on early European product

12. Proposal to Council for Directive of 9 Sept. 1976, OJ C 241, 14 Oct. 1976, 1.
13. OJ L 210, 7 Aug. 1985, 29.
14. The inclusion of the defence was a demand of the British Conservative Government under Margaret Thatcher: D. Fairgrieve and R. Goldberg, *Product Liability* (3rd edn, OUP 2020) § 13.33.
15. More precisely, the notion of consumer expectations was mentioned in comment g of section 402A of the Restatement Second (Torts). Section 402A advocated strict liability in tort for products 'in a defective condition unreasonable dangerous to the user or consumer' and comment g suggested that a product was unreasonably dangerous when in a condition 'not contemplated by the ultimate consumer'.

liability.[16] The paradox, or irony,[17] is that when the PLD was eventually adopted after a decade of discussion, US courts and lawyers were to a large extent turning their back on the consumer expectations test, which they regarded as ill-fitted for design and instruction defects.[18] At the time of its adoption, the PLD thus reflected an outdated state of legal scholarship, at least from a US perspective. This did not necessarily bid well for the future of product liability in Europe.

As a matter of fact, even though the PLD attracted considerable doctrinal attention and served as a model for product liability legislation in several countries outside the ECC,[19] it initially looked as though its practical relevance would remain very limited. The Member States had three years to transpose the Directive, but most of them seemed in no hurry to do so and exceeded the deadline. Even after the transposition, very few cases were reported in the 1990s and early 2000s in which the PLD regime was applied by national courts.[20] Things have slowly been changing, though. The number of national court decisions applying the regime seems to be on the rise in most European Union (EU) jurisdictions, though it remains quite low, and the Court of Justice of the European Union (CJEU, formerly the Court of Justice of the European Communities or CJEC) has been steadily developing its case law on the PLD. At any rate, the Directive has become an established feature of European private law. The regime it sets out is familiar to (tort) lawyers across the EU and even beyond[21] – they may not always be enthusiastic about it, but they usually accept it as part of the landscape of their legal system.[22] As is often the case, age has brought respectability, so that nearly four decades after the adoption of the PLD, hardly anybody in the EU questions its existence, nor the idea that producers should be strictly liable for damage caused by a safety defect in their products.

16. P. Schlechtriem, 'Presentation of a Product and Products Liability under the EC Directive' (1989) 9 Tel Aviv U. Stud. L. 33.
17. G. L. Priest, 'The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States' (1989) 9 Tel Aviv U. Stud. L. 93: 'The irony is that, just at the time that the devastating implications of the strict liability approach are becoming clear in the U.S., the European community has decided to impose strict products liability upon its member states.'
18. On the distinction between different types of defects, see infra III.A.1.b.
19. Countries that have drawn inspiration from the PLD for their own product liability legislation include European nations like Norway (see B. Askeland, 'Norway' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 359, 360) and Switzerland (see B. A. Koch and P. Pichonnaz, 'Der Entwurf einer neuen EU-Produkthaftungsrichtlinie aus schweizerischer Sicht' (2023) 119 Schweizerische Juristen-Zeitung 627, 628), but also many non-European ones like Australia (see M. Lunney, 'Product Liability in the Rest of the World' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 413, 414), Japan (see Y. Shiomi, 'Product Liability in Japan' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 62, 66), Korea (see K. Y. Yeun, 'Entwicklung und Tendenz der Produkthaftung in Korea' in *Festschrift für Erwin Deutsch* (Carl Heymanns Verlag 1999), 405), Malaysia (see A. Che Ngah, S. Shaik Ahmad Yusoff and R. Ismail, 'Product Liability in Malaysia' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 120, 122), or Québec (see M.-A. Arbour, 'Canada' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 479, 482).
20. This was noted by many authors, and also in the Second Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM (2000) 0893 final.
21. See supra fn. 19. Besides, in the UK, Part I of the Consumer Protection Act 1987 which transposed the PLD has remained in force despite Brexit.
22. There are some exceptions, however: see H. Koziol, 'Introductory Lecture' in H. Koziol and others (eds), *Product Liability. Fundamental Questions in a Comparative Perspective* (De Gruyter 2017) 13, 20-25; D. Nolan, 'Against Strict Product Liability' in *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).

This is confirmed by the reform process of the PLD now under way. With the development of new technologies, including artificial intelligence (AI), and the digitalisation of the economy becoming a major concern at the EU level, the European Commission set up in 2018 an Expert Group on Liability and New Technologies, the task of which was to analyse how to adapt liability rules to the challenges raised by these technologies. Product liability obviously plays a major role in that respect and the idea was originally to draft 'guidelines' that would help the courts apply the PLD to new products, including AI, born out of these new technologies.[23] Despite the Expert Group's hard work,[24] these guidelines never came out. Instead, the Commission decided to embark on a more ambitious project and to officially revise the PLD. After a public consultation and an impact assessment were carried out, the Commission published a Proposal for a new Directive on Product Liability (the Draft PLD) on 28 September 2022.[25]

The Draft PLD has already been the subject of many analyses.[26] From a technical point of view, it is a convincing project. Drawing on the PLD and accompanying case law, as well as on a vast body of pan-European scholarship and previous proposals and recommendations,[27] the Draft 'modernises' product liability by adapting it to the new digital environment. This is not an easy task, as digitalisation has an impact on nearly all aspects of product liability, be it the definition of products, the type of damage that should be compensated or the moment when defectiveness is assessed. Given the complexity of these issues, the modernisation of the PLD comes at the cost of a disconcerting technicality, which stands in marked contrast to the relative straightforwardness of the current Directive. Nevertheless, and subject to some improvements which commentators have suggested, and which

23. The status of these guidelines always remained unclear. Whether or not their nature would have been similar to that of existing guidelines enacted by the European Commission, such as those on the setting of fines in case of breach of competition law rules (the status of which has been at least partially determined by the CJEU: see esp. Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri A/S et al. v. Commission of the European Communities* [2005] ECLI:EU:C:2005:408), guidelines pertaining to the PLD might have achieved an extension of the instrument's field of application (esp. by including software and algorithms within the definition of products) but they could not have adapted the existing regime to the specificities of such products, nor could they have broadened the range of potential defendants or mended the other shortcomings of the PLD (on which see infra II).
24. Materialised by an interesting report: 'Expert Group on Liability and New Technologies – New Technologies Formation, Liability for Artificial Intelligence and Other Emerging Digital Technologies' (2019) <https://data.europa.eu/doi/10.2838/573689> accessed 30 May 2023.
25. Proposal for a Directive of the European Parliament and of the Council on liability for defective products, 28 Sept. 2022, COM (2022) 495 final.
26. See, eg S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023); G. Spindler, 'Die Vorschläge der EU-Kommission zu einer neuen Produkthaftung und zur Haftung von Herstellern und Betreibern Künstlicher Intelligenz' (2022) Computer und Recht 689; G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191.
27. The European Law Institute (ELI), in particular, has played a major role in mustering European scholarship to react to the European Commission's initiatives on product liability and to provide potential content for the future PLD. See esp. Twigg-Flesner (ed.), *Guiding Principles for Updating the Product Liability Directive for the Digital Age, ELI Innovation Paper* (2021) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf> accessed 30 May 2023; ELI, 'Response of the European Law Institute to European Commission's Public Consultation on Civil Liability Adapting Liability Rules to the Digital Age and Artificial Intelligence' (2022) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Public_Consultation_on_Civil_Liability.pdf> accessed 30 May 2023; ELI, 'Draft of a Revised Product Liability Directive' (2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf> accessed 30 May 2023; ELI, 'Feedback on the European Commission's Proposal for a Revised Product Liability Directive' (2023) <https://www.europeanlawinstitute.eu/news-events/news-contd/news/eli-provides-feedback-on-the-european-commissions-proposal-for-a-revised-product-liability-directiv/> accessed 30 May 2023.

will hopefully be implemented as a result of the ongoing tripartite negotiations between the European Commission, the European Parliament and national governments, the Draft PLD stands a good chance of giving birth to a new EU Directive on product liability by the Spring of 2024. It is hoped that this new Directive will establish itself as a worldwide benchmark for product liability in the context of a digitalised economy and trigger the so-called 'Brussels-effect',[28] perhaps best exemplified by the General Data Protection Regulation (GDPR),[29] whereby EU legislation imposes itself as a global model.[30]

Strikingly, the discussion around product liability reform and the Draft PLD has focused on technical issues. There has hardly been any debate on the policy objectives of product liability, let alone on the opportunity of strict liability for products. The implicit assumption is clearly that these policy issues have been settled once and for all by the current PLD. Why the European Commission should rely on it is obvious. The Commission understands its task as making, and not unmaking, legislation. It has no interest in questioning the justifications and aims of a directive which it has consistently presented as an 'effective and relevant instrument'.[31] It is perhaps more surprising that academics have not been more critical. Except for a few authors, scholarship on the PLD and product liability reform seems to have been very positivistic.[32] Once adopted, the PLD has generally been taken for granted and the discussions have concentrated on the many technical questions raised by its application; and the same holds true for the reform. Yet, the policy choices which underly the PLD and the Draft PLD deserve discussion.

Modern legislation is typically finalised, in the sense that is intended to achieve a given social, economic, or political goal (or a set of such goals). Its purpose is not to say what the law is, from a jus-naturalist perspective, but to create the law, so as to produce a certain result, which is regarded as socially, economically, or politically desirable. This is particularly true of EU legislation. The EU and its forerunner, the EEC, were created with a view to achieving precise goals, and their (considerable) legislative activity has been geared towards this achievement, either directly or indirectly. Accordingly, each item of EEC or EU legislation is endowed with 'policy' or 'strategic' objectives. These should be understood as the final goals which the piece of legislation seeks to achieve, as opposed to the 'imme-

28. G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191.

29. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

30. For an example of the Draft PLD's echo beyond the EU, see B. A. Koch and P. Pichonnaz, 'Der Entwurf einer neuen EU-Produkthaftungsrichtlinie aus schweizerischer Sicht' (2023) 119(12) Schweizerische Juristen-Zeitung 627.

31. Explanatory Memorandum of the Draft PLD, 7, mentioning European Commission, 'Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products – Final Report' (2018) <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023. The various reports that have been published on the Directive, and which are mostly self-serving prose by or on behalf of the European Commission, are accessible at <https://single-market-economy.ec.europa.eu/single-market/goods/free-movement-sectors/liability-defective-products_en> accessed 10 February 2023. For a detailed analysis of the first reports findings, see S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 444-50.

32. Among the most significant exceptions are authors from the common law world: see esp. J. Stapleton, 'Three Problems with the New Product Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 257; S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonisation* (OUP 2005).

diate' or 'specific' objectives, which are the technical measures put in place to reach these final goals.[33]

Enunciating the policy objectives of an EEC or EU piece of legislation – something normally done it the recitals – can be seen as a formal exercise, not deserving too much attention. However, legislation should never be an end in itself (although it is too often the case, as the sociology of organisations tells us). The PLD, like any other piece of legislation, only makes sense against a useful and realistic purpose. If it does not, then it should not have been adopted in the first place or it should be repealed. The policy objectives of the PLD must therefore be taken seriously. They cannot be discarded offhandedly when discussing the Directive, as if they were purely decorative. The many technical discussions on the PLD are interesting and useful, but they make sense only if the PLD's aims are valid and can be achieved.

The present article is an attempt to deflect the ongoing discussion on product liability reform from purely technical issues to more basic questions concerning the *raison d'être* of the PLD. What are the objectives of that Directive? Were they reasonable and have they been achieved? And if not, what should be done for the future PLD to achieve them? In the next section, I will try to show that the PLD as it stands cannot and does not achieve the objectives that were assigned to it. These objectives were not realistic in the first place and the PLD has not lived up to them. It should therefore come as no surprise if the PLD's application record is extremely disappointing (II). Based on these findings, I will consider what changes ought to be made in the current EU product liability regime to give the future PLD a better chance to become a truly useful piece of legislation (III). Finally, I will offer some conclusive remarks (IV).

II. Assessing the PLD

The PLD's policy objectives are set out in its first two recitals, which provide:

> 'Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property;
>
> Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production'.

The first recital thus sets out three objectives for the PLD: creating a level playing field for producers; facilitating the free movement of goods; and harmonising consumer protection. The second recital sets out a fourth objective, namely 'the fair apportionment of the

33. This distinction is clearly put forward in European Commission, 'Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products – Final Report' (2018) <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023.

risks inherent in modern technological production', and links it to liability without fault, implying that liability for fault does not achieve such a fair apportionment.

The first and third objectives are not distinct, since it can be assumed that if producers are treated the same way with respect to damage caused by their products, so will consumers suffering such damage. The second objective can also be regarded as consubstantial with the first (and third) one, given that the creation of a level playing field between producers appears to be a (necessary but not sufficient) condition of the free movement of goods. The fourth objective, on the other hand, is clearly distinct. Although the expression 'consumer protection' is not used in Recital 2, this idea clearly underlies the latter. Given the background against which the PLD was adopted (namely a situation where, at least on the face of it, liability for fault normally applied to damage caused by products), opting for strict liability means that liability for fault is not considered as striking the right balance between the interests of producers and those of consumers, and that consumer protection therefore needs to be enhanced. This is confirmed by several other recitals, which justify different technical features of the PLD by reference to 'the protection of consumers'.[34]

However, the notion of 'consumer protection' is both misleading and ambiguous. It is misleading insofar as consumers are not the only persons protected by the Directive. Admittedly, the types of damage covered by the instrument mean that, in practice, only natural persons can rely on the PLD. On the other hand, anyone physically injured by a defective product can have a claim against the producer, even if they were not acting as a consumer at the time of the injury (as may be the case of an employee injured by a defective device at work). It would therefore be more accurate to speak of 'protection of injured persons'. However, in keeping with the PLD and common usage, 'consumer protection' will be the expression used in this article.

'Consumer protection' is an ambiguous notion because it can have at least two different meanings. Under the first one, which could be termed the stronger sense, consumer protection refers to the direct protection of consumers (or other potentially injured persons), namely the avoidance of injuries to their interests. In the context of product liability, such direct protection is achieved when damage is avoided. In the stronger sense of the term, consumer protection therefore means fewer defective products and fewer injuries, and collapses into deterrence. In a weaker sense, consumer protection in the context of product liability refers not to the avoidance of damage, but to the facilitation of compensation. In other words, an instrument achieves consumer protection in that sense if it makes it easier for consumers (or injured persons) to be compensated for damage caused by products. The two conceptions are not mutually exclusive. Typically, rules on unfair contract terms aim both at deterring professionals from including such terms in their contracts and at providing redress for consumers if such terms nevertheless find their way into these contracts. As first glance, it is not obvious if the PLD adopts the stronger conception (deterrence) or the weaker conception (compensation) of consumer protection, or both. A critical appraisal of

34. Recital 4 (range of persons liable); Recital 5 (joint and several liability in case of multiple tortfeasors); Recital 8 (lack of incidence of third parties' fault); Recital 9 (types of damage covered); Recital 12 (lack of contractual derogation); Recital 13 (preservation of contractual and non-contractual claims based on other grounds than that of the Directive; and preservation of special national liability regimes in the sector of pharmaceuticals); Recital 15 (possibility to set aside the exclusion of primary agricultural products and game from the scope of the Directive); Recital 16 (possibility to set aside the development risk defence); Recital 17 (conditions under which Member States can set financial limits to the liability established by the Directive).

the PLD's objectives will help to clarify this (A). Whether these objectives have been achieved in practice will be considered next (B).

A. Unconvincing Objectives

The two policy objectives assigned to the PLD are compatible only up to a certain point. If consumer protection were the sole aim of the PLD, the latter should be a minimum harmonisation directive, as is (or was) normally the case with 'true' consumer law directives, and Member States should be allowed to introduce rules that are even more favourable to consumers than those in the PLD.[35] However, to do so would call into question market harmonisation, and would thus run counter to the other objective of the PLD, namely the proper functioning of the common market. It is therefore necessary to rank these two objectives to know which one should be made to prevail in case they come into conflict.

It did not take long for the CJEC to analyse the PLD as a full harmonisation directive, thus clearly picking the establishment of a common market as its prevailing objective. As a consequence, France and Greece were pointed at in 2002 for incorrectly transposing the PLD and had to modify the national implementation provisions in which they had departed from the Directive to grant better rights to consumers and claimants generally.[36] At the same time, the application of a Spanish strict liability regime that afforded greater protection to injured parties than the PLD was barred in the name of full harmonisation.[37] A few years later, some consumer-friendly aspects of the Danish transposition provisions were also found to violate the Directive.[38]

The position taken by the CJEC can hardly be challenged on technical grounds. The PLD is clearly not a minimal harmonisation directive, as is shown for example by the permission granted to Member States to derogate from it on certain points only (Article 15). Besides, the PLD was adopted on the basis of Article 100 of the Treaty establishing the European Economic Community (EEC Treaty),[39] which gave the EEC competence to 'issue directives for the approximation of such provisions (…) as directly affect the establishment or functioning of the common market.' By contrast, there was no provision in the EEC Treaty mentioning consumer protection back in 1985.[40]

Whether the priority given to the establishment of a common market over consumer protection is justified from a policy point of view is another question, the answer to which depends at least partly on how credible these two objectives are. The problem is that neither of them is truly convincing, though for different reasons. To put things bluntly, product

35. Being more favourable to consumers, these rules would presumably have a stronger deterrent effect and make it easier for consumers to be compensated in case of damage.
36. C-52/00 *Commission v. France* [2002] ECR 2002 I-03827, ECLI:EU:C:2002:252; C-154/00 *Commission v. Greece* [2002] ECR 2002 I-03879, ECLI:EU:C:2002:254.
37. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255.
38. C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006] ECR 2006 I-00199, ECLI:EU:C:2006:6.
39. Now Article 114 of the Treaty on the Functioning of the European Union (TFEU).
40. Since the EEC had not been given competence to legislate on consumer protection in 1985, it can be argued that the PLD was not validly adopted: see J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 428-29; J. Stapleton, *Product Liability* (Butterworths 1994) 53-60. However, its validity was never challenged in court and consumer protection has since been included within the EU's sphere of competence (Articles 12 and 169 of the TFEU).

liability harmonisation is not needed for the establishment of a common market (1), and the PLD does not take consumer protection that seriously (2).

1. Product Liability Harmonisation Is Not Needed for the Establishment of a Common Market

Article 100 of the EEC Treaty being the only available legal basis for the adoption of the PLD in 1985, heralding the establishment of a common market as the Directive's primary objective may appear as an opportunistic move by the European Commission. This view is supported by the fact that the PLD itself seriously limits its ability to harmonise product liability across Europe by opening some options to the Member States (Article 15) and by excluding different types of damage from its scope. As Simon Whittaker rightly noted: 'the extent to which the Directive itself qualified its own purported purpose in harmonisation is quite remarkable.'[41] As a consequence, the PLD's official objective of establishing a common market should arguably not be taken at face value. On the other hand, what has been written has been written, and the Court of Justice relied on Article 100 to prioritise the establishment of a common market over consumer protection. Besides, the European Commission has chosen to retain both objectives in the Draft PLD (Recital 1). Establishing a common market is therefore an objective that must be taken seriously.

Harmonising product liability for the sake of achieving this objective rests on the idea that product liability can distort competition between economic operators from different Member States. To be more precise, there are two underlying assumptions justifying the adoption of the PLD to establish a truly common market. The first one is that harmonised rules are needed if economic operators are to be treated in the same way when answering for damage caused by their products. The second one, which is more general in nature, is that differences in civil liability, including product liability, can have a significant impact on the costs borne by economic operators, and thus on their performances and on the decisions they take.

Whether the first assumption is justified hinges on private international law. Under EU law, liability for damage caused by defective products is normally governed by the law of the country in which the person sustaining the damage has their residence, or in which the product is marketed, or in which the damage occurs. This is in essence the solution set out by Article 5(1) of the Rome II Regulation,[42] which is very close to the one provided in the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.[43] Even before the Rome II Regulation was adopted, there was a distinct tendency by courts to sim-

41. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 436. On the limited scope of the harmonisation achieved by the PLD, see also P. Machnikowski, 'Conclusions' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 669, §§ 8-23.
42. Regulation (EC) N° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40. I assume that 'product liability' as understood in the PLD is covered by Article 5 of the Rome II Regulation, even though the scopes of application of the latter and the former do not necessarily coincide: S. Whittaker, 'The Product Liability Directive and Rome II Article 5: "Full Harmonisation" and the Conflict of Laws' (2011) 13 The Cambridge Yearbook of European Legal Studies 435.
43. See esp. Articles 4 and 5. Only five EU countries have ratified this Convention.

ply apply the *lex fori* when confronted with a product liability case with an international dimension.[44]

As a result, when damage is caused by a product in one country, the producer will normally not be treated differently depending on its nationality, or where it has its main place of business, or where the product was manufactured. Save in exceptional cases,[45] the origin or nationality of the producer has no impact on the applicable product liability rules, and producers from one country marketing their products in another Member State do not risk being discriminated against due to their nationality. Product liability is therefore not a source of direct discrimination between economic operators from different Member States.

The second assumption underlying the harmonisation of product liability for the sake of the establishment of a common market does not rest on more solid ground. The extent to which legal rules generally have an impact on costs or the behaviour of economic operators is a matter for debate.[46] At any rate, civil liability constitutes only a small subset of the legal system and, as a rule, its economic impact is most likely very limited. There are very good reasons for that, only some of which can be mentioned here. Civil liability is seldom a certain consequence of a given business decision. It is rather a risk, the materialisation of which may not occur until long after the decision. The magnitude of that risk is also limited, given the general under-enforcement of civil liability rules.[47] It is therefore unlikely that such a remote and limited risk will bear heavily on the decision to, say, develop or market a product. Besides, those who take the decision will often not be affected directly by any liability which may ensue. It is the company that will be made liable, and not its directors or whoever took the decision in its name; and given the delay between the decision and the moment when liability is effectively recognised, the person who took the decision may not have an interest in the company anymore when this occurs. This further reduces the incentive to consider civil liability rules when making business decisions.[48]

Admittedly, in the middle of the 1980s, a fit of panic apparently seized US companies and insurers due to product liability allegedly getting out of control.[49] However, the episode was short-lived,[50] and its importance may have been exaggerated in the wider context of the bitter US debate on tort law reform. Moreover, several features of the US system, like limited social security coverage, the possibility to bring class actions, the availability of punitive damages and the widespread use of contingency fees by lawyers greatly increase the incen-

44. C. Wasserstein Fassberg, 'Products Liability and the Conflict of Laws: Theory and Practice' (1989) 9 Tel Aviv U. Stud. L. 205, 227-30.
45. See Articles 5(1), par. 2, and 5(2) of the Rome II Regulation.
46. See the thought-provoking article of S. Sugarman, 'Doing Away with Tort Law' (1985) 73 California L. Rev. 558. On the lack of clear-cut empirical evidence on the subject, see P. Fenn and N. Rickman, 'Personal injury Litigation' in P. Cane and H. M. Kritzer, *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 235, 253.
47. Given the general under-enforcement that affects civil liability rules, see infra II.B.
48. On the equivocal conclusions that may be drawn from studies carried out in the United States on the effects of product liability rules on business decisions, see G. Schwartz, 'Reality in the economic Analysis of Tort Law: Does Tort Law Really Deter?' (1994) 42 UCLA L. Rev. 377, 405-13. For a more general review of empirical studies on the subject, see M. A. Geistfeld, 'Products Liability' in M. Faure (ed.), *Tort Law and Economics* (Edward Elgar 2009) 287, 301-04.
49. G. L. Priest, 'The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States' (1989) 9 Tel Aviv U. Stud. L. 93, 94-96.
50. On the later evolution of product liability case law in the US, see J. A. Henderson and T. Eisenberg, 'The Quiet Revolution in Products Liability: An Empirical Study of Legal Change' (1990) 37(3) UCLA L. Rev. 479.

tives to claim and the potential economic impact of civil liability rules.[51] In Europe, there seems to be no evidence that these rules, let alone product liability ones, have a significant impact on the costs borne by economic operators, or on the decisions they make.[52]

Even if this were the case, the establishment of a common market would be put at risk only if there were significant differences between Member States in that respect. From a common market perspective, the issue is not the 'absolute' level of liability, but the variations of that level within the EEC or the EU. Here again, there is no evidence that there existed such differences when the PLD was adopted.[53] Quite to the contrary, there was already a strong convergence of product liability rules across Europe at that time.[54]

Finally, as Simon Whittaker has observed, 'the ultimate burden of liability for defective products falling on producers and suppliers depends not merely on the legal basis of their liability ("fault", "negligence", "no fault" or "defect") and on such factors as the quantification of damages and social security, but also on the incidence of liabilities in other persons', and 'on the availability and judicial practices of recourse by those other persons held liable for harm caused by defective products.'[55] In other words, the extent to which producers and other potential defendants eventually have to assume the cost of damage caused by products depends not only on the aspects of product liability governed by the PLD, but also on many other rules, starting with those on recourse, which the Directive does not even pretend to harmonise.

It is therefore not the case that the harmonisation of product liability was needed to establish a common market.[56] The economic impact of product liability rules is most likely limited; and even if it were not, the proximity of pre-existing national rules and the limited ability of the PLD to effectively harmonise the burden borne by economic operators due to damage caused by products drastically limit the Directive's potential contribution to the advent of a truly common market.

2. The PLD Does Not Take Consumer Protection So Seriously

Product liability promotes consumer protection, in the stronger sense of the term, if it deters producers or other economic operators from putting defective products on the market, thus reducing the number of accidents. However, it is doubtful if the PLD can have any significant effect in that respect.

51. M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, §§ 64-66.
52. According to some studies, the cost of product liability insurance in the 1980s accounted for less than 1% as a percentage of sales: G. Eads and P. Reuter, Designing Safer Products: 'Corporate Responses to Product Liability Law and Regulation', Rand Corporation Study R-3022-I C J 1983 46, 91, cited by D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 166. The figure obviously needs to be updated, but there seems to be no indication that, in the EU, the cost of product liability insurance has ever been very high, nor that availability of insurance has ever been a problem: M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 25; S. Whittaker, 'Introduction to Fault in Product Liability' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 1, 50.
53. J. Stapleton, 'Three Problems with the New Product Liability' in P. Cane and J. Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) 257, 281.
54. See J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 194.
55. S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 564.
56. M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 33.

First, it should be kept in mind that the Directive did not arrive in a legal vacuum. Only if it has increased the level of deterrence compared with the previous state of the law has it really improved consumer protection. Economic theory tells us that, in an 'ideal world' with rational economic operators and no transaction costs, strict liability does not increase the level of precaution of potential tortfeasors beyond what is achieved through liability for fault, because it does not make sense, from an economic point of view, to avoid damage if the cost of avoiding it is greater than the cost of compensating for it. Of course, we do not live in an ideal world, and it is very difficult to say if, in practice, a shift from liability for fault to strict liability (which is what the PLD purported to achieve) really has no impact on product safety. However, civil liability rules probably have little influence on the behaviour of economic operators, as has just been said,[57] and whatever empirical evidence there is confirms that the impact of product liability on product safety and the number of accidents is at best very limited.[58] As Bernhard Koch put it nicely: 'Probably the by far most over-estimated effect of tort law is deterrence.'[59] To take just one example, France shifted from a strict to a super-strict liability regime for traffic accidents in 1985[60] but this apparently did not have any significant effect on traffic accidents statistics (which were running very high). By contrast, what did have a major impact was the multiplication of radars and speed controls a few years later. This would suggest that, if one wants to increase the safety of products, one should insist on safety rules and controls rather than on product liability. Furthermore, as shall be seen in more detail below, the PLD did not introduce a radical change from pre-existing national product liability rules. In many cases, liability based on defectiveness is not that different from fault-based liability.[61]

The PLD is therefore not apt to have a significant positive effect on consumer protection, understood as a reduction in the number of damaging products in circulation. If the Directive is to contribute to consumer protection, then it must be the weaker form of such protection, ie making compensation easier. In that sense, consumer protection is an objective that is certainly not out of reach for the PLD. Such an instrument can undoubtedly raise the level of consumer protection beyond what is provided for by national laws. The question is whether the drafters of the PLD ever really wanted to do so.

As we know, the consumer protection objective is subordinated to the establishment of a common market. It is also counterbalanced by the need to consider the interests of producers as well. By its very nature, tort law seeks a balance between the interests of the various stakeholders, starting with potential claimants and potential defendants. Whatever the type of liability that is adopted, protection of the former cannot totally ignore the interests of the latter. This is made clear by Recitals 2 and 7 of the PLD, which explicitly speak of a 'fair apportionment of risk' between injured persons and producers. Consumer protection in the Directive cannot therefore be understood as implying a sacrifice of the producers' interests. In practice, as the many defences available to defendants demonstrate,[62] the desire

57. See supra II.A.1.
58. In the words of two authors who reviewed available empirical studies, '[t]hese studies conclude that product liability has had no noticeable impact on accident rates': A. M. Polinsky and M. Shavell, 'The Uneasy Case for Product Liability' (2010) 123 Harvard L. Rev. 1437, 1455.
59. B. A. Koch, 'Why Tort Law Seems to Fail Sometimes' in H. Koziol and U. Magnus (eds), *Essays in Honour of Jaap Spier* (Jan Sramek Verlag 2016) 137, 144.
60. On which see J.-S. Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (2018) 53(2) Wake Forest L. Rev., 265.
61. See infra III.B.1.
62. See infra III.B.2.

to limit the burden on producers or other economic operators has led to restricting consumer protection in different ways, quite independently from common market concerns.

The result is a paradoxical and rather uncomfortable situation. The PLD's first objective is not a realistic one since harmonising product liability would likely not have any significant impact on the establishment of a common market. The second objective, if understood as the weaker form of consumer protection, is much more convincing but somewhat of a *trompe-l'œil* since it is subordinated to the first (unrealistic) objective and is also tempered by a strong desire to limit the financial burden on producers. Given this situation, the PLD was doomed to fail, in the sense that there was no way in which it could achieve the objectives assigned to it. Unfortunately, this is confirmed by the (limited) available data on the application of the Directive.

B. Limited Application

No quantitative study has apparently ever been carried out to measure the impact of the PLD on the establishment of a common market and on deterrence, but this would be a formidable enterprise and not worth the effort, given what has just been said on the irrelevance of these objectives. The only thing that could be measured, though with difficulty, is the effect of the PLD on consumer protection in the weaker sense of the term, ie on the compensation of those injured by defective products. From now on, 'consumer protection' will therefore be understood in that second sense only.

To precisely assess the practical impact of the PLD on consumer protection, studies should be carried out to determine the proportion of people injured by defective products receiving compensation based on tort law rules, and whether this proportion has increased thanks to the Directive. Unfortunately, no such study exists, and for very good reasons. For one thing, there seem to be no EU-wide statistics on accidents and damage caused by products, let alone defective ones. Likewise, there are no statistics on the number of people injured by products and receiving compensation.

However, whatever empirical evidence we have suggests that there is a huge number of accidents caused by defective products. In the US, the Consumer Product Safety Commission (CPSC) collects data on product-related injuries and publishes an estimated nationwide number of such injuries. The 2022 estimation is nearly 13 million.[63] Obviously, only some of these injuries are caused by defects in products, and it is impossible to know what proportion they represent. Guessing is not a very scientific approach, but if we make a cautious hypothesis and assume that this proportion is only one in ten, this still leaves more than one million injuries attributable to defective products in the US in 2022. At that same time, the total US population was 337 million, against 447 million in the EU. Assuming that the injury rate and the proportion of defective products are approximately the same in both geographical areas, this would mean that more than 1.5 million accidents are currently caused by defective products in the EU each year.

There are many reasons why this figure has no scientific value, including the fact that product safety rules are possibly more stringent in the EU than in the US, meaning that a lower proportion of all products in circulation could be defective in the former than in the latter. However, the level of product safety in the EU should not be overrated. Several stud-

63. The statistics established by the CPSC are available at <https://www.cpsc.gov/cgibin/NEISSQuery/home.aspx> accessed 6 June 2023. While the figures are still huge, they are lower than in the 1970s: D. G. Owen and M. J. Davis, *Products Liability and Safety* (7th edn, Foundation Press 2015) 11.

ies have shown that a large proportion of products sold online do not comply with EU safety standards. For example, a 2015 online safety sweep by the OECD revealed that 471 out of a selected 693 products that had been banned or recalled (68%) were still available for sale online, and that 33 of 60 selected products did not comply with product safety standards.[64] In 2020, the BEUC, an EU consumer organisation, carried out a study on 250 electrical goods, toys, cosmetics and other products bought from online marketplaces such as Amazon, AliExpress, eBay and Wish, which had been selected based on possible risks. The study found that 66% of them failed EU safety laws with possible consequences such as electric shock, fire or suffocation.[65] Two years later, that same organisation published a follow-up document, compiling several studies by national consumer organisations, with numerous examples of scaringly non-conforming and dangerous products sold online.[66] Since products are increasingly sold online, and even assuming that a larger proportion of products sold in physical stores comply with product safety rules, this means that there is a huge number of products in circulation in the EU that do not meet safety standards and that are probably defective in the sense of the PLD.[67] Not all of them cause damage, fortunately, but even if only a small proportion does, this must represent a very significant number of accidents and injuries every year. Besides, even products conforming to safety standards may be defective. Despite the lack of precise figures, it can therefore be assumed that a huge number of defective products are in circulation in the EU, and that they cause at least several hundred thousand accidents and injuries each year.

This is to be contrasted with the number of cases brought before courts based on the PLD. Here again, there are no precise EU-wide statistics but, even if the number of published cases seems on the rise, it remains ridiculously low in comparison with the likely number of accidents and injuries caused by defective products. Interestingly, this has been confirmed by the latest study on the application of the PLD commissioned by the European Commission, which was carried out by external consultants and published in 2018 (the 2018 Evaluation).[68] It comprises both a quantitative and a qualitative evaluation, only the first one being of interest to us at this stage. This quantitative evaluation covers the 2000-2016 period. It is rather disappointing as it is based on data found in public and commercial databases, the content of which is not comprehensive.[69] Additional data could probably have been obtained from various stakeholders, starting with insurance companies, but there was apparently no attempt to get it.

64. Data available at <https://www.oecd.org/sti/consumer/safe-products-online/> accessed 10 May 2023.
65. See press release of 24 February 2020 <https://www.beuc.eu/press-releases/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups> accessed 10 May 2023.
66. BEUC, 'Products from online marketplaces continue to fail safety tests. Compilation of research on unsafe products from online marketplaces from 2021 and 2022', 2022 <https://www.beuc.eu/reports/products-online-marketplaces-continue-fail-safety-tests> accessed 10 May 2023.
67. A product that does not conform with mandatory safety requirements normally 'does not provide the safety which a person is entitled to expect' and is therefore defective according to Article 6 of the PLD.
68. The study is available online at <https://op.europa.eu/en/publication-detail/-/publication/d4e3e1f5-526c-11e8-be1d-01aa75ed71a1/language-en> accessed 16 May 2023. The main findings of the Evaluation have been synthetised by the Commission in its Commission Staff Working Document, 7 May 2018, SWD (2018) 157 final.
69. The 2018 Evaluation contains the following precision at 14-15: 'The number of cases resolved judicially in the 28 Member States was retrieved from country fiches filled through desk research at national level. Such information, however, should be treated with caution as each country fiche was completed on the basis of the specific features of national jurisdiction and the public databases available. For instance, the French country fiche reports cases retrieved through the main public legal databases, in which the first instance decisions are not listed. Therefore, the analysis for France is limited to the decisions of the courts of appeal and the Supreme Court between 1 January 2000 and 31 December 2016. As these cases were ➤

The 2018 Evaluation has identified a total of 547 product liability claims brought before the courts in Member States over the 2000-2016 period.[70] The number is so small as to be laughable. This makes an average of 32 cases per year across more than 20 countries! The figure is of course not conclusive, since the 2018 Evaluation has clearly not identified all product liability cases brought to court (especially those which did not go farther than the first instance)[71] and a vast majority of cases are most likely settled out of court. The number of settled cases is even more difficult to apprehend. The 2018 Evaluation indicates, based on the information given by various stakeholders, that 32% of PLD-related cases are resolved in court.[72] This seems very high. In England and Wales, it has been estimated that only around 1% of these claims are resolved in court.[73] The figure is probably higher in many Member States, where the incentives to settle are not so strong, but it seems unlikely that as many as one third of the claims give rise to a judgment. However, if this were the case, then, based on the number of court cases identified by the 2018 Evaluation, only 1709 PLD-related claims would have been brought during the 2000-2016 period across the EU – an average of 95 per year. As a reminder, the overall population of the EU (then including the United Kingdom) during that period was around 500 million people.

While the 2018 Evaluation is not conclusive, other elements confirm that the number of PLD-related claims is indeed very low. Apart maybe from Austria,[74] there seems to be no EU country where such claims are said to be frequent.[75] In the case of France, the little data that is available points in the same direction. Unfortunately, the French Ministry of Justice has discontinued the publication of its Statistical Yearbook (*Annuaire statistique de la justice*), which gave a breakdown of claims brought before French courts based on their legal ground.[76] The section on 'tort and quasi-contract' included a category named 'claims for compensation for damage caused by a defective product or service'.[77] The last available figures date back to 2005, 2006, 2009 and 2010.

retrieved from commercial and public databases of case law which rarely report all cases, it may be assumed that this figure underestimates the real dimension of claims based on product liability rules in Europe (for instance, no published cases were reported for Malta, although the targeted survey has shown that product liability cases are often decided in the country's small claims courts).'

70. 2018 Evaluation, 19.
71. On the other hand, it is not clear if the methodology adopted in the 2018 Evaluation was designed to avoid the double- or even triple-counting of cases that were recorded both at the appellate and the Supreme Court levels (and even possibly at the first-instance level).
72. 2018 Evaluation, 18. Representatives of different industries regularly declare that they face (too) many product liability claims and that most of these are settled out of court, but no figures ever seem to be given, so that such declarations cannot be taken at face value.
73. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) § 10.1, citing the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (commonly known as the Pearson Commission), Cmnd 7054, 1978, vol. 2, Table 124. The authors believe the general pattern of the figures given in the Pearson Report to be still valid.
74. See the many cases cited by C. Rabl, *Produkthaftungsgesetz* (LexisNexis 2017).
75. The trend seems to apply even beyond the EU, except in the US (but it should be remembered that the PLD has been copied in many parts of the world, see supra fn. 19): M. Reimann, 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard' (2003) 51(4) Am. J. Comp. L. 751, 804-05.
76. The yearbooks are available online at <http://www.justice.gouv.fr/statistiques-10054/annuaires-statistiques-de-la-justice-10304/> accessed 5 June 2023).
77. 'Demandes en réparation des dommages causés par un produit ou une prestation de services défectueux'.

France. Number of claims for compensation for damage caused by a defective product or service

Year	First-instance claims	Appeals
2005	1205	365
2006	1181	340
2009	1253	236
2010*	1252	222

* Annuaire statistique de la justice, Justice civile, Détail des saisines en 2010 <http://www.justice.gouv.fr/statistiques-10054/annuaires-statistiques-de-la-justice-10304/annuaire-statistique-de-la-justice-23263.html> accessed 17 May 2023.

It is not possible to know how many of these claims concerned defective products (as opposed to services), and how many were based on the PLD regime (as opposed to another regime, such as liability for fault). It is not possible either to know precisely how the figures have evolved since then. However, a search carried out on France's probably largest database[78] for the year 2022 turns out 92 judgments by French appellate courts[79] in which the provisions implementing the PLD were invoked (though not necessarily applied). Assuming that the figures do not vary tremendously from one year to another and that a majority of appellate court decisions are recorded on the database, as seems to be the case, this suggests that around 100 PLD-related claims are currently brought before French appellate courts each year, which is not inconsistent with the figures given in the Statistical Yearbooks. Based on the general appellate rate of around 15% for civil judgments,[80] this suggests that the number of PLD-related claims brought before French first-instance courts is around 600 per year. Considering that France accounts for 15% of the EU population, and assuming the rate of accidents caused by defective products is the same across the EU, then this figure is to be contrasted with the possibly more than 100,000 accidents caused by defective products in the country each year. The 'conversion rate' of accidents into judicial claims would thus be less than 1% (France being a country where access to justice is comparatively cheap and where the incentives to settle out of court are not as strong as in some other countries).[81]

In England, Scotland and Wales, the Compensation Recovery Unit (CRU), in charge of recouping social security payments and National Health Service costs from tortfeasors, registers the number of cases and of settlements that are reported to it each year.[82] These cases and settlements are divided into categories, depending on the origin of the death or personal injury. The main categories are clinical negligence, employers' liability, motor accidents and 'public liability' (which involves accidents in public places and on privately owned land).[83] Product liability is included in the 'other' category, which represented 4,743 cases and 6,346 settlements in 2022-23, ie around 1% of the total, as well as around 1% of

78. <https://www.doctrine.fr/> While this database appears to be the most comprehensive one in France, what proportion of all the decisions by French appellate courts is included in it is not known.
79. The figures regarding first-instance judgments are much lower but not significant since most first-instance judgments are not recorded on the database.
80. This is the figure given by the French Ministry of Justice for civil courts in 2019: 'Les chiffres clés de la justice 2021', 7 <http://www.justice.gouv.fr/art_pix/chiffres_cles_2021_web.pdf> accessed 12 June 2023.
81. It should also be remembered that not all cases taken to court end up in the claimant being awarded damages.
82. These are only cases of personal injury and death, but there are probably not many product liability claims for damage to property only.
83. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 184.

the sums recovered by the CRU.[84] Unfortunately, the proportion of product liability- (let alone PLD-) related claims or settlements in the 'other' category is not known. However, their number, though undoubtedly much higher than what the 2018 Evaluation suggests, is probably not that important. Besides, other (older) data from the United Kingdom (UK) suggests that only a very small proportion of those suffering personal injuries effectively bring a claim, especially in the case of home accidents – of which defective products are a significant potential source.[85]

Another interesting element is the product categories giving rise to PLD-related claims. The breakdown of court cases identified by the 2018 Evaluation is as follows:

Recurrence of product categories subject of claims over 2000-2016*

Product categories	Total	%
Raw materials	116	21%
Pharmaceutical products	88	16%
Vehicles	83	15%
Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof	68	12%
Miscellaneous manufactured articles	44	8%
Chemicals	40	7%
Agricultural goods	38	7%
Electrical machinery and equipment and others	33	6%
Foods & beverages	16	3%
Clothing and accessories	11	2%
Cosmetics	10	2%
Total	**547**	**100%**

* 2018 Evaluation, 18-19.

Assuming this table reflects the actual breakdown of all PLD-related cases brought to court, including those that have not been identified,[86] it suggests that the litigation rate varies greatly depending on the type of product that causes damage. For instance, it is quite surprising that raw materials account for nearly four times as many cases as electrical machinery and equipment, a category which one would expect to be particularly accident-prone. One possible explanation for these variations could be the difficulty to prove defect (and causation), which is presumably greater for complex products than for simpler ones.[87] On the other hand, the significant proportion of claims involving pharmaceuticals

84. <https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data> accessed 22 May 2023. For reasons unknown, the total number of claims and settlements has dropped sharply since 2020 and the number of 'other' claims and settlements has varied greatly over the 2010-2023 period. For an analysis of the evolution of personal injury claims at the beginning of the 2000s, see A. Morris, 'Spiralling or Stabilising? The Compensation Culture and Our Propensity to Claim Damages for Personal Injury' (2007) 70(3) Modern L. Rev. 349.
85. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 185-86.
86. Which may not be the case, if only because the number of cases identified in the 2018 Study is probably too low to be statistically significant.
87. Moreover, it is possible that electricity is included in the 'raw materials' category. The figures for 2022 indicate that there is a surprisingly large number of cases involving electricity (power surges) at the appellate court level in France.

also suggests that such difficulties, which are notorious in the case of pharmaceuticals, are not the only factor to be taken account.[88] The importance of pharmaceuticals in PLD-related litigation is confirmed when analysing the French appellate court cases for 2022 mentioned earlier. However, with regard to pharmaceuticals, it should be noted that, at least in France, court cases concern a very limited number of products, the defectiveness of which has already been acknowledged in earlier decisions.

Another very significant element in the 2018 Evaluation is the number of cross-border court cases that have been identified: 'over the period 2000-2016, there were only 21 cross-border cases (ie 3% of the total number) for defective products where the injured person summoned a defendant from another Member State. Only four cases (ie 0.05% of the cases) involved a third-country defendant.'[89] These figures are all the more striking as Article 7(2) of the Brussels I Regulation grants jurisdiction, in matters relating to tort, delict or quasi-delict, to the courts of the place where the harmful event occurred or may occur.[90] Someone suffering damage caused by a defective product therefore does not need to go abroad to file a claim for compensation, even when the producer or defendant is not located in the same country as they are. Yet, claims filed against foreign defendants seem almost non-existent in product liability. This is confirmed by the analysis of the French appellate court decisions in 2022. In most of these cases, the claimant(s) and the defendant(s) were all domiciled in France. When a foreign party was involved (always a defendant), it appeared to have been brought into the case by the initial (French) defendant. Besides, there seems to have been only one appellate court case since 2022 where the PLD was invoked, and the defendant was a non-EU company.[91]

These elements of data, however patchy, suggest that the PLD is grossly under-implemented. Only very few cases that could give rise to liability based on the Directive result in the injured person being compensated by the producer or another person liable under it, after either a settlement or a court procedure. As such, the under-implementation of the PLD should not come as a surprise. While it is very difficult to measure the extent to which tort law is generally implemented, studies indicate that under-enforcement is a massive issue,[92] and there is no reason why product liability should be different.

Some reasons for under-enforcement are well known.[93] It may be difficult for someone to know that they have suffered damage caused by a product. In the case of pharmaceuticals, for example, a patient may have no idea, at least initially, that their current condition was triggered by a product taken several years before. When someone knows that their damage was caused by a product, the size of that damage may not be worth the effort of claiming compensation. And when it is, there are innumerable obstacles that must be overcome before the victim can get compensation from the liable person. The most formidable ones

88. Unfortunately, the 2018 Evaluation does not give an indication on the success rate of claims depending on the types of products involved.
89. 2018 Evaluation, 35.
90. Regulation (EU) N° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.
91. CA Douai, 5 January 2023, n° 21/03184. In that case, one of the defendants was the US producer of the product, but there were also French defendants involved.
92. See eg D. Dewees, D. Duff and M. Trebilock, *Exploring the Domain of Accident Law* (OUP 1996).
93. On the factors which determine the 'transformation' of damage into claims, see eg W. Felstiner, R. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming and Claiming' (1981) 15 L. & Soc. Rev. 631; H. Genn, 'Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages' in D. Harris and others, *Compensation and Support for Illness and Injury* (Clarendon Press 1984) 45.

are probably non-legal. Seeking redress can be costly both financially and psychologically, and many people do not have the resources, or the minimum level of literacy or self-confidence, that would allow them to do so. Even when they do, they face many legal and practical hurdles: they must identify the producer or another liable party; they must have or gather sufficient evidence showing or at least suggesting that the product was defective and that it caused them harm; they must reach the right person or service at the producer's and face potential delaying or discouraging tactics; they must be ready to hire a counsel and go to court if necessary; they must not be time-barred; etc. These multiple obstacles mean that seeking compensation for minor injuries or damage is usually not worth the effort. Besides, in many Member States, serious damage is often compensated to a large extent through either social security (in case of bodily injuries) or private insurance (for example in case of damage caused to personal property covered by household insurance). This lowers the incentive for those injured to bring tort claims, and social security or insurers may not have the elements of information required, or the time and resources, to bring recourse claims against tortfeasors.

There is no reason to believe that these various hurdles are any lower in product liability than in other fields of tort law.[94] Quite to the contrary, defendants in product liability cases are always professionals, and sometimes very big firms with sophisticated legal counsel and tactics, which have many occasions to use the court system and can be considered as 'repeat players.' By contrast, claimants are typically individuals with no habit of going to court, also called 'one-shotters'[95] (even though private insurance companies are sometimes subrogated in their rights). The cost of going to court, or even to engage in settlement negotiations, is therefore proportionally much greater, in terms of money, time, stress, and affects, for claimants than for defendants.

The problem with the PLD is not under-implementation as such, but its extent. Taking the 1,709 PLD-related claims which, according to the 2018 Evaluation, were brought both in and out of court during the 2000-2016 period, and assuming that 1,000,000 accidents were caused each year by defective products in the EU over that same period (an assumption that has no scientific basis but seems rather conservative in view of the data mentioned earlier in this section), this means that only one out of 10,526 potential product liability cases gave rise to a claim based on the PLD. With such an application rate, the PLD can hardly be termed a success in terms of consumer protection; and the same would be true if the real figure were one hundred times higher. Even taking the French figures, which seem more favourable, the conversion rate of damage into claims probably remains very low. The data on cross-border litigation is even more worrying. It means that, when a defective product is marketed by its producer directly in a foreign country, injured parties are in effect left without a remedy under the PLD and the producer is immune to product liability. Given the importance of cross-border trade, and the EU's efforts to abolish internal economic borders, this cannot be regarded as a minor issue. It contradicts not only consumer protection but also the PLD's primary objective, namely the establishment of a common market. The PLD, far from contributing to such establishment, is acting as an obstacle to it by creating, or at least maintaining, differences between local and foreign producers.

94. For a discussion of the institutional, procedural, and social factors that specifically impact the application of product liability rules, and probably account for the differences between the US and the rest of the world, see M. Reimann, 'Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard' (2003) 51(4) Am. J. Comp. L. 751, 810-35.

95. On the distinction between repeat players and one-shotters, see M. Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) L. & Soc'y Rev. 95, 97.

Such a situation cannot be accepted. Neither can it be blamed only on the obstacles that impede the application of tort law generally. The conversion rate of accidents into claims is clearly higher in other fields of tort law. For example, the French figures for 2010 indicate that 6,735 claims were brought before civil courts[96] in relation to traffic accidents,[97] for an average of 76,000 traffic accidents per year having caused bodily injuries over the previous three years.[98] The conversion rate is therefore nearly 10%, even though insurers have an obligation to offer a settlement to victims of traffic accidents under French law.[99] Likewise, in the UK, the proportion of injuries giving rise to claims is undoubtedly higher for traffic accidents or industrial accidents that for accidents caused by defective products.[100] The fact that the PLD is much less relied upon than other tort law regimes strongly suggests that there is something wrong with the instrument itself. It is not only the general environment that makes it difficult to apply the PLD, but also the specific features of the liability regime it establishes.

Strikingly, though, neither the 2018 Evaluation nor the European Commission's Report on the application of the PLD based on it[101] seem to see the problem.[102] They draw no conclusion from the appalling figures on the application of the PLD that have just been mentioned. Instead, they rely on the 'qualitative study' carried out by external consultants for the 2018 Evaluation to conclude that the PLD has mostly met its objectives and that nearly all is well with the instrument as it stands. The qualitative study is based on the answers to various questions and on comments made by stakeholders. According to these stakeholders, the PLD 'contributes to a level playing field in the single market and contributes to consumer protection'.[103] Neither the external consultants nor the European Commission seem to regard as a problem that a vast majority of stakeholders involved in the qualitative study were 'businesses, related associations, and insurers' associations' (527 out of 657, ie 80%), which have a vested interest in keeping the level of consumer protection as low as possible. And even if this were not the case, the above-mentioned figures totally forbid that the PLD be considered as a success and as meeting its objectives in terms of consumer protection.

96. Under French law, compensation claims based on tort law rules can also be brought before criminal courts when a criminal offence has been committed, which is often the case in traffic accidents. Unfortunately, the Statistical Yearbook does not give any indication on such claims.

97. Annuaire statistique de la justice. Édition 2011-2012, 61.

98. Data available at <https://www.onisr.securite-routiere.gouv.fr/etat-de-l-insecurite-routiere?field_theme_target_id=638> accessed 5 June 2023. The assumption is that victims of traffic accidents, if they bring a claim in court for compensation, will usually do so within three years of the accident (even though the limitation period in France is much longer for such claims).

99. Article 12 of Loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures.

100. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, Cambridge University Press 2018) 185.

101. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Council Directive on the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products (85/374/EEC), 7 May 2018, COM (2018) 246 final.

102. This was also true of earlier reports on the application of the PLD: S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 444-50.

103. Commission Staff Working Document, 7 May 2018, SWD (2018) 157 final, 60: 'There is a consensus among stakeholders that overall the Product Liability Directive contributes to a level playing field in the single market and contributes to consumer protection. This is better achieved than could be done at national level. It matches expectations in the sense that consumers are aware of their right to compensation for damage caused by defective products and that it provides a clear legal framework for businesses across the EU.'

The only significant problems which the European Commission identifies in its assessment of the PLD are the burden of proving defect and causation, which lays on the claimant and is sometimes difficult to discharge, especially for complex products, and the need to adapt certain notions, such as 'product', 'producer', 'defect' or 'damage', to new economic conditions.[104] These are real issues, especially the first one. However, the difficulty to prove defect and causation cannot on its own explain why so few people are compensated thanks to the PLD, nor why cross-border redress is almost non-existent.

The ineffectiveness of the PLD is the elephant in the room of EU product liability. It is a major issue which never seems to be discussed. Yet, if the PLD is as ineffective as this section suggests, something radical needs to be done. One possibility would be to simply abrogate the PLD. The idea is not as extravagant as it seems and has recently been forcefully put forward in the UK,[105] though on other grounds than the Directive's ineffectiveness. If the PLD is not relied upon by persons injured by defective products, then why keep this piece of legislation? Ineffective legislation is not innocuous. It makes the state of the law more complicated, which is problematic especially for non-sophisticated players such as one-time claimants. There are also costs associated with such legislation. The time, intelligence and money spent in analysing it, explaining it, and trying to implement it are mostly wasted. Even worse, the PLD has arguably contributed to a lowering of the level of consumer protection in some countries, by preventing injured parties from seeking compensation from suppliers, which are usually easier to reach than producers.[106] It is quite possible that the cost-benefit balance of the PLD is negative, which would make it a defective product and justify its abrogation.[107]

However, this is clearly not an option in the EU context. The EU will never get rid of the PLD, even if this were the soundest move. Doing so would give the impression that the EU sacrifices consumer protection, which, even if not true in practice, would be suicidal from a political point of view. Additionally, both the European Commission and the European Parliament have identified the adaptation of the PLD as a way of signalling their eagerness to address the challenges raised by the development of the digital economy and of AI, meaning that this instrument has acquired additional political relevance. Finally, and despite the recurring discourse about the need to legislate less but better, the EU is structurally a law-producing entity. Suppressing legislation, be it for the sake of clarity and effectivity, runs directly against its deepest nature.

Since the PLD is here to stay, the sensible thing to do would be to reform it so that it becomes more effective and that persons injured by defective products are able to rely on it in practice. There is now a unique opportunity to do so. Unfortunately, the reform that is currently being contemplated does not really tackle the central problem of the PLD's ineffectiveness. The European Commission has been (voluntarily?) blinded by the flawed conclusions of the 2018 Evaluation and considers that the only real issue is to adapt the PLD to the digitalisation of the economy. However, making the PLD applicable to new products such as software is useless if the Directive is not relied upon in the first place. Simply extend-

104. COM (2018) 246 final, 8-9.
105. D. Nolan, 'Against Strict Product Liability' in: *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).
106. See infra III.A.1.
107. Several authors have described the PLD as a defective product, which is of course a tempting classification: see eg M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, § 27, citing P. Storm, 'Een gebrekkig product' (1985) Maanblad voor Ondernemingsrecht 245.

ing the scope of application of an instrument that cannot achieve the objectives assigned to it will not make that instrument more effective. In fact, given the complexity inherent in digital products, it is likely that applying the PLD to them will be even more difficult than applying it to 'ordinary' products. Adapting the PLD to the digital economy makes sense only if the liability regime it establishes is modified in such a way that it can begin to achieve what it was made for. Otherwise, the PLD reform will only be a public relations operation, intended to show that the EU is 'doing something' about digitalisation.

III. Reforming the PLD

The policy objectives laid out in the first recitals of the Draft PLD are the same as those of the current PLD.[108] The aim therefore remains to help achieve the establishment of a common market and to improve consumer protection. Given what was said earlier about the Directive's limited ability to significantly contribute to either the advent of a truly common market or consumer protection in the stronger sense of the term (ie deterrence), the main concern should be to strengthen the PLD's contribution to consumer protection in the weaker sense of the term. In other words, changes should be made so that persons injured by defective products effectively rely on the PLD to be compensated.[109]

The costs of reforming the PLD, including for consumers, should not be underrated. A new set of rules always generates a degree of complexity and uncertainty, especially when it introduces new legal concepts. Courts and lawyers need a certain amount of time to come to terms with these new rules and concepts, during which it may be difficult for potential claimants and defendants to know precisely what their rights or duties are, and what chances they stand to bring successful claims, or to successfully resist claims. In the case of the PLD, the process of specifying the rules and reducing uncertainty has been rather long and has not yet come to an end. Nearly forty years after the Directive was adopted, there is still a steady (and even possibly growing) flow of interpretation questions referred to the CJEU. Yet, the central issue of defectiveness has hardly been touched upon by the Court so far.[110] Whatever clarification a reform of the PLD may provide in that respect, it will also bring its own share of added complexity and uncertainty.

It is already clear that the projected reform will come with high transition and adaptation costs. The Draft PLD is a very complex piece of legislation, which almost makes the current Directive look like 'product liability for beginners' by contrast. Given the complexity inherent in digital products, most notably their ability to evolve after they were initially put into circulation thanks to software updates, this complexity will remain for the most part, even if the Draft undergoes some simplification, as will hopefully be the case. The introduction of new notions and the change in the scope of product liability, especially due to the inclusion of software within the 'product' category (Article 4(1)) and of related ser-

108. See Recitals 1 and 2 of the Draft PLD, which are almost word-for-word the same as Recitals 1 and 2 of the current PLD.

109. As the European Commission put it in its latest report on the PLD, COM (2018) 246 final, 9: 'To make sure that the single market lives up to its full potential we need to reassure consumers that their rights will be respected.'

110. It has been addressed directly only in Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015], ECLI:EU:C:2015:148.

vices within the 'component' category (Article 4(3)) will raise new questions, which courts will need time to answer (if they ever do).[111] Moreover, the difficulty of proving defect in relation to products 'powered' by AI should not be underestimated.[112] In the short run, the impact of the reform on the complexity and uncertainty of EU product liability should therefore be negative. And insofar as legal uncertainty deters potentially meritorious claims, it acts as a shield for potential defendants. This is even truer where there is a structural imbalance between the claimant and the defendant, as is often the case in product liability.

Since the costs of reform are inevitable, the real issue is whether, in the middle and long run, a new PLD can make it easier for injured parties to be compensated for product-related damage. If, and only if, the reform addresses the right issues, will the reform be justified, and its benefits dwarf its costs.

If the PLD is to meet as well as possible the objectives that were initially assigned to it, it is necessary to broaden the range of potential defendants (A) and to strike a better balance between the interests of injured persons and those of producers (B).

A. Broadening the Range of Potential Defendants

The most obvious problem regarding the application of the PLD is the near-absence of cross-border redress.[113] The PLD is not to be blamed for the difficulty to bring cross-border claims, which is a much broader issue, but this is not a reason for quietly accepting this situation until the time comes where initiating cross-border litigation will be as easy as bringing a claim in one's own country (assuming this can ever be easy). If there are no cross-border claims in practice, then the PLD should be modified so that those injured can, as much as is possible, seek redress without needing to engage in cross-border procedures. The Draft PLD contains some interesting proposals in that respect, but it has not fully acknowledged the seriousness of the problem (1) and more radical changes are required (2).

1. The Flaws in the PLD and the Draft PLD

The PLD as it stands rests on an idealised vision of the EU as a unified jurisdiction, where internal political borders and differences between Member States are not an obstacle when it comes to seeking redress. Accordingly, it was designed so that someone suffering damage caused by a defective product should always have a defendant against which to turn within the EU. This is the reason why the importer of a product into the EU is liable as the producer (Article 3(2)). By contrast, the drafters of the PLD did not regard as a problem that a potential claimant should not have a defendant against which to claim in their own country. The

111. It should be stressed that the distinction between products and services, which stands at the root of *product* liability as a distinct liability regime, has never been totally clear: W.C. Powers, 'Distinguishing between Products and Services in Strict Liability' (1984) 62(3) North Carolina L. Rev. 415; J. Stapleton, 'Software, Information and the Concept of Product' (1989) 9 Tel Aviv U. Stud. L. 147. The projected extension of the PLD to software and related services further blurs the line between the two notions, and indirectly questions the very justification of the regime established by the Directive: D. Nolan, 'Against Strict Product Liability' in *Questions of Liability: Essays on the Law of Tort* (Hart Publishing, forthcoming 2023).

112. J.-S. Borghetti, 'Civil Liability for Artificial Intelligence: What Should its Basis Be?' (2019) 17 Revue des juristes de Sciences Po 76; G. Wagner, 'Produkthaftung für autonome 'système' (2017) 217 Archiv für die civilistische Praxis 707, 724-48.

113. The available information only concerns cross-border *judicial* redress, but it would be extremely surprising if cross-border settlements were thriving.

liability of suppliers is thus foreseen only as a fallback solution, where the producer (or importer) of the product cannot be identified and the supplier does not inform the injured person, within a reasonable time, of the identity of the producer or of the person who supplied them with the product.

In that respect, the PLD has worsened consumer protection in some Member States. In Denmark[114] and France,[115] for example, professional suppliers used to be strictly liable for damage caused by a product's safety defect, meaning that injured persons could seek redress from these suppliers, usually located in their own country, without having to reach a producer or importer located in another Member State. Such rules have been abandoned due to the implementation of the PLD. This is of course detrimental to injured persons and creates a strong incentive to rely on purely national rules instead of the Directive, where the former accept strict contractual liability of suppliers on another ground than the product's safety defect (for example based on the warranty for latent defects).

Fortunately, the absence of real supplier liability in the PLD is mitigated by the rule in the second limb of Article 3(1) of the PLD, whereby the 'quasi-producer', ie the person presenting itself as the producer by putting its name, trademark or other distinguishing feature on the product, shall answer for the product's defect like the 'real' producer. The CJEU has recently adopted a broad interpretation of that rule, by deciding that 'the concept of "producer", referred to in that provision, does not require that the person who has put his name, trade mark or other distinguishing feature on the product, or who has authorised those particulars to be put on the product, also present himself as the producer of that product in some other way.'[116] In practice, putting one's name or trademark on the product is therefore enough to be regarded as its producer, even if the identity of the real producer is also apparent on the product and even if a reasonable person would not have been led to believe that the person having put its name or trademark on the product had actually manufactured the product. This interpretation is debatable but does make things much easier for injured parties.[117] It is very often the case that, when a product is marketed in a country, a local company will put its name on it. If the product turns out to be defective, the injured party will then be able to sue that company based on the rule in Article 3(1), without having to ascertain the exact relationship of that company to the product (producer, importer, 'own brander', etc). However, when the product has been produced in another Member State (or imported from outside the EU by an importer located in another Member State) and no local company puts its name or trademark on in, the injured party will have no choice but to seek redress from a defendant located in another Member State, something which case law tells us is very difficult to do.

The evolution of marketing processes since the PLD was designed should also be taken into consideration. Forty years ago, products manufactured outside the EEC and sold within it were typically imported, ie bought by a European company from the producer (or another intermediary) and then resold to end-users (or another intermediary), with a transfer of title. Modern marketing techniques and actors, including online retail platforms, now make it possible for non-EU companies to directly market their products in the EU, without

114. As is explained in C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006] ECR 2006 I-00199, ECLI:EU:C:2006:6, at 12.

115. J.-S. Borghetti, 'The Development of Product Liability in France' in S. Whittaker (ed.), *The Development of Product Liability* (Cambridge University Press 2010) 87, 97.

116. C-264/21 *Keskinäinen Vakuutusyhtiö Fennia v. Koninklijke Philips NV* [2022], ECLI:EU:C:2022:536, at 38.

117. If taken literally, the solution laid down by the CJEU would result, for instance, in an airline being regarded as the producer of the plane it puts its name upon.

the need for an intermediary acquiring and then re-transferring ownership of the products. Intermediaries are only needed for the shipment and delivery of the product, and possibly for connecting the producer and the buyer. If a product marketed in that way turns out to be defective and causes damage, the only defendant the injured person can claim against, under the PLD, is the non-EU producer, which will likely be impossible to reach in practice.[118] This means that non-EU producers that directly market their products in the EU without relying on an importer are *de facto* immune to product liability in the EU.

The Draft PLD addresses this problem only partially. It retains the idea of a 'cascade' of defendants. Subject to minor adaptations, Article 7 maintains the list, definition and ranking of potential defendants set out in the current PLD. The producer, renamed the manufacturer, comes first (Article 7(1)).[119] Assimilated to it is the quasi-producer or quasi-manufacturer,[120] defined as 'any person who markets that product under its name or trademark' (Article 7(1)).[121] As is currently the case,[122] this definition should include any person involved in the marketing of the product and putting its name or trademark on it, even if other names or trademarks are also present on the product and if the exact role played by the defendant in the marketing process is not known to third parties. Where the manufacturer of the defective product is established outside the Union, the importer of the defective product and the authorised representative of the manufacturer can be held liable (Article 7(2)).[123] The liability of suppliers, renamed distributors,[124] remains of a subsidiary nature. It only arises where a manufacturer cannot be identified (or, when the manufacturer is established outside the Union, where an economic operator higher up the 'cascade' cannot be identified), provided that (a) the claimant requests that distributor to identify the economic operator or the person who supplied the distributor with the product; and (b) the distributor fails to identify the economic operator or the person who supplied the distributor with the product within one month of receiving the request (Article 7(5)).

118. Given its share in the worldwide manufacturing industry and in the import of products into the EU, China is the country where a non-EU manufacturer is most likely to be established. Suing a Chinese company in China is almost doomed to fail; however: A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567, 576. And enforcing a foreign judgment in China does not seem to offer better prospects: W. Zhang, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the Due Service Requirement and the Principle of Reciprocity' (2013) 12 Chinese J. Int'l L. 143; K. F. Tsang, 'Enforcement of foreign commercial judgments in China' (2018) 14(2) J. Priv. Int'l L. 262.
119. Article 4(11) defines the manufacturer as 'any natural or legal person who develops, manufactures or produces a product or has a product designed or manufactured'. Since the two notions of 'producer' (PLD) and 'manufacturer' (Draft PLD) are very close, and for the sake of simplicity, I shall keep talking of 'producers' in this section, even in relation to the Draft.
120. Article 4(11) further classes as a producer any person 'who develops, manufactures or produces a product for its own use'. This is presumably intended to capture the solution set out in C-203/99 *Henning Veedfald v. Århus* Amtskommune [2001], ECR 2001 I-03569, ECLI:EU:C:2001:258.
121. Article 4(11). It could be disputed if any person putting its name or trademark on the product should be considered as marketing it.
122. See supra fn. 116.
123. Article 4(12) defines the authorised representative (not mentioned in the current PLD) as 'any natural or legal person established within the Union who has received a written mandate from a manufacturer to act on its behalf in relation to specified tasks'. Article 4(13) defines the importer as 'any natural or legal person established within the Union who places a product from a third country on the Union market'. It is not clear why a person established outside the EU cannot be regarded as an importer, even though the practical chances that such a person would be sued are extremely low.
124. Article 4(15) defines the distributor as 'any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market'. Here again, and for the sake of clarity, I shall keep using the notion of 'supplier', which is used in the PLD and is equivalent.

Interestingly, the Draft PLD adds three categories to the list of potential defendants, only two of which are significant in the context of the current discussion: fulfilment service providers and online platforms.[125] Following the Market Surveillance Regulation,[126] Article 4(14) of the Draft PLD defines a fulfilment service provider as 'any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of a product, without having ownership of the product', with the exception of postal services, of parcel delivery services, and of freight transport services. An online platform is defined by reference to the Digital Services Act (DSA),[127] according to which it is 'a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation' (Article 3(i)).

Article 7(3) of the Draft provides that where the manufacturer of the defective product is established outside the EU and neither the manufacturer's authorised representative nor the importer of the product is established in the EU, the fulfilment service provider shall be held liable for damage caused by the defective product. This provision could become very relevant in practice, since fulfilment service providers have come to play a great role in modern marketing techniques, especially when a product is sold online. Those who sell products online can handle the packaging and dispatching of these products themselves, but they often rely on fulfilment service providers, especially when they sell through online retail platforms. Making fulfilment service providers liable under the PLD is thus a way to provide the person injured with a new defendant when the defective product has been bought online, as is increasingly the case. However, there are some serious limits to the improvement brought about by Article 7(3) of the Draft PLD.

Products sold online are often offered on online retail platforms. These platforms can operate under two business models: fulfilment by e-retail marketplaces (FRM) or fulfilment by merchants (FBM).[128] Under the FRM model, sellers send their products to the platform, which then handles the warehousing, packing, shipping, and post-sale customer service. When this is the case, the online retail platform is neither an importer[129] nor a distributor (since it never acquires ownership of the product), but it acts as a fulfilment service provider and could therefore be made liable under Article 7(3) of the Draft PLD if a product sold through it turns out to be defective. When the online retail platform uses the FBM model on the other hand, there may or may not be a fulfilment service provider (since the seller may handle the packing and dispatching by itself), but if there is one, it is not the online retail platform and the buyer may find it difficult or impossible to identify. Unless the online

125. Under Article 7(5), 'any natural or legal person that modifies a product that has already been placed on the market or put into service shall be considered a manufacturer of the product for the purposes of paragraph 1, where the modification is considered substantial under relevant Union or national rules on product safety and is undertaken outside the original manufacturer's control'.

126. Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products [2019] OJ L 169/1, art. 3(11).

127. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services (Digital Services Act) [2022] OJ L 277/1.

128. On these two models, see E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 69; V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 978.

129. The platform normally does not act as the manufacturer's authorised representative either.

retail platform operates under the FRM model and takes on the role of a fulfilment service provider, someone buying a product through a platform normally has no idea who acted as fulfilment service provider for that product. The buyer may or may not know which company handled the delivery, but even if they do, that company may not be the fulfilment service provider (it can be a subcontractor, for example) and they will anyway probably have forgotten its identity by the time they seek redress for damage caused by the product. They may of course ask the seller which company acted as a fulfilment service provider for the sale of that defective product, but whether they will get an answer and be able to reach that fulfilment service provider is doubtful.

In practice, the liability of fulfilment service providers will thus be helpful to persons injured by a defective product where the product was bought through an online retail platform operating under the FRM model, and on the condition that the manufacturer is established outside the EU and there is no authorised representative of the manufacturer or importer of the product established in the EU. This is a significant step forward for consumer protection since many major online retail platforms operate at least partly under the FRM model. Amazon, for instance, operates both under the FRM and the FBM models and could therefore be made liable under Article 7(3) of the Draft PLD where non-EU manufacturers sell defective products through it using the FRM option.

However, the liability of fulfilment service providers will not apply, or will be of little concrete help, in many if not most of the cases where the PLD is deficient because it does not provide the injured person with a defendant located in their country of residence: where the manufacturer, the manufacturer's representative or the importer of the product is located in another Member State (in which cases the fulfilment service provider is not liable); and where there is no manufacturer, manufacturer's representative or importer in the EU, but the product was sold through an online retail platform operating under the FBM model (in which case the fulfilment service provider will be liable in theory, assuming there is such a provider, but it will probably be impossible to identify or to reach).

The liability of fulfilment service providers, as foreseen in the Draft PLD, is therefore far from completely filling the hole in the racket of consumer protection resulting from the lack of accessible defendants. Unfortunately, neither does the liability of online platforms set out at Article 7(6) of the Draft PLD. Under this provision, the 'provider of an online platform that allows consumers to conclude distance contracts with traders and that is not a manufacturer, importer or distributor' shall be liable for damage caused by a defective product sold through it, but only where three cumulative conditions are met: 1) there is no identified manufacturer in the EU, and no identified importer, authorised representative or fulfilment service provider; and 2) the online platform presented the product or otherwise enabled the specific transaction at issue in a way that would have led an average consumer to believe that the product was provided either by the online platform itself or by a person acting under its authority or control; and 3) the claimant requests that online platform to identify the economic operator or the person who supplied the product and the platform fails to identify the economic operator or the person who supplied the product within one month of receiving the request. It is only in exceptional circumstances that these three conditions will be met. The second one is borrowed from Article 6(3) of the DSA and provides online platforms with a remarkably efficient shield against liability since it is easy for them to clearly indicate that they are not providing the products themselves. The third condition, which also applies to the liability of suppliers, is quite restrictive as well, since online platforms should normally be able to indicate what were the suppliers of products sold through them. The liability of online retail platforms as set out in Article 7(6) of the

Draft PLD is thus rather theoretical. Such platforms stand more chances of being made liable based on Article 7(3) of the Draft PLD in their capacity as fulfilment service providers, provided they operate under the FRM model. However, this still leaves many cases where persons suffering damage caused by a defective product will have no accessible defendant against which to bring an action.

2. Moving Forward

If the PLD is to grant effective avenues of redress to those suffering damage caused by defective products, radical steps need to be taken in terms of who must answer for such products. Unless EU product liability should remain a dead letter, the PLD cannot stick to the idea that having a defendant in the EU is enough. Reaching a defendant in another Member State can be an ordeal. What a claimant needs is an *accessible* defendant.[130]

The equation for providing those suffering damage caused by defective products with an accessible defendant is rather simple. They should be allowed to seek redress from the person from or through which they bought the product. If they were able to make contact with that person to buy the product, the chances are that it will be reasonably easy for them to make contact again if they seek redress. Admittedly, this is not true for bystanders, ie those injured by a product which they did not themselves buy or own. However, bystanders usually have some kind of proximity to the owner of the defective product, if only physical or geographical, meaning that if the defendant is easily accessible to the buyer of the product, and if that product caused damage to the bystander while in the buyer's use, the defendant should also be within reasonable reach of the injured bystander.

Products are very often bought from distributors or, nowadays, through online platforms.[131] Therefore, if the PLD is to provide potential claimants with accessible defendants, it should tighten both the liability of distributors (a) and the liability of online platforms (b).

a. Liability of Suppliers

The liability of suppliers stands as a last resort in both the PLD and the Draft PLD. It should be the contrary. Those suffering damage caused by a defective product should be allowed to seek redress from the supplier of the product, whenever there is such a supplier. The liability of the supplier should apply regardless of whether there is an identified manufacturer or any other potential defendant established in the EU.

The reasons for this solution were clearly set out by Justice Traynor in the landmark US case *Vandermark v. Ford Motor Co.*: 'Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases, the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to

130. On the importance of accessibility for consumer-redress mechanisms, based on an empirical study, see C. Hodges, 'Consumer Redress: Ideology and Empiricism' in K. Purnhagen and P. Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer 2014) 793, 815-18.

131. It is estimated that, in 2022, 68% of individuals aged 16-74 in the EU purchased at least one item online (but not necessarily through an online retail platform): Eurostat, available at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Table1-Internet_use_and_online_purchases,_2022_(%25_of_individuals_aged_16_to_74).png> accessed 12 June 2023.

safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.'[132]

In the United States, the strict liability of professional suppliers for defective products became a common feature of product liability as of the 1960s.[133] It was accepted in the Restatement (Second) of Torts[134] and reaffirmed by the Restatement (Third) of Torts: Products Liability.[135] Such liability also existed in some Member States before the transposition of the PLD.[136] Admittedly, in the last decades, many US States have passed legislation limiting the liability of non-manufacturers for defective products.[137] Whatever the motivation behind these statutes (which was probably at least partly a desire to protect local companies), they have resulted in depriving those injured by defective products of any practical chance of being compensated when these products are manufactured in foreign countries, especially China, and sold by US sellers which do not inspect them or put their name on it, as is often the case. This has resulted in calls to reinstate the strict liability of suppliers, at least under certain circumstances.[138] As was explained earlier, products manufactured abroad are equally a problem in the EU and the need for sellers' liability is as strong in Europe as it is in the US.

The objections that are commonly brought against the strict liability of suppliers or sellers for defective products are not convincing. The most rehearsed one is that suppliers typically have no possibility to inspect the products they sell, and therefore to identify or avoid the defects in them.[139] This is true, but it simply means that the liability of suppliers for defective products is truly strict.[140] Besides, in the EU context, importers can already be made liable even though they typically have no possibility to inspect the products they sell, and the Draft PLD wants fulfilment service providers, which have even less control over the characteristics of the products they handle, to be liable as well under certain circumstances. If importers and fulfilment service providers can be made strictly liable, why not suppliers and distributors?[141] Besides, distributors can choose which products they sell and would thus have an incentive to select safe products, should they be made liable for the defective products they sell. By contrast, fulfilment service providers are probably not always in a position to select the products they store or dispatch, meaning that their liability may not result in fewer defective products being put on the market.

132. *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964) at 8 (citations omitted).
133. F. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213.
134. See supra fn. 7.
135. Restatement (Third) of Torts: Products Liability § 1 (1998), stating that '[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect'.
136. See supra III.A.1.
137. For an inventory and typology of this legislation, see A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567.
138. Loc. cit.
139. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213, 227; A. Feeney, 'In Search of Remedy: Do State Laws Exempting Sellers from Strict Product Liability Adequately Protect Consumers Harmed by Defective Chinese-Manufactured Products' (2009) 34(2) J. Corp. L. 567, 571.
140. The strictness of this liability is of course tempered by the fact that the supplier will normally have a recourse against the manufacturer; see infra.
141. The same is true concerning the argument that because non-manufacturers did not cause the defect, they are ill-equipped to defend against a lawsuit.

A third reason to reject suppliers' liability is allegedly that making suppliers liable leads to indemnification claims, which 'is needlessly circuitous and engenders wasteful litigation',[142] in comparison with direct claims against manufacturers.[143] This reason was specifically put forward by the CJEC when it found that France was not allowed to loosen the conditions under which suppliers can be liable for damage caused by defective products when transposing the PLD.[144] Undoubtedly, since there are currently almost no direct cross-border claims against manufacturers, making suppliers liable should result in more claims being brought than there are now, both against suppliers and between suppliers and manufacturers. It is also true that it might be cheaper for manufacturers to directly answer claims brought by those injured by their products, as they might otherwise have to bear at least part of the transaction costs associated with the recourse and earlier claims.[145] However, the extra costs associated with recourse claims by suppliers (or other non-manufacturers) are the price to pay if those injured by products are to be given effective means of redress. Besides, in the current situation, the absence of direct claims against foreign manufacturers means that, unless an intermediary can be made liable under the PLD, these manufacturers will never have to pay for damage caused by their products and will therefore not have this incentive to eliminate defects in their products. From an economic point of view, it is likely much preferable to have manufacturers answer for damage caused by defects in their products, even if this involves at least two claims (by the injured person against the suppliers, and by the supplier against the manufacturer), rather than no liability of manufacturers at all.

There are therefore no convincing reasons to refuse the strict liability of suppliers for damage caused by the defects in the products they sell, or to limit it drastically as both the PLD and the Draft PLD do. Quite to the contrary, such liability is necessary both if those injured are to be granted effective means of redress, and if foreign-based producers are to answer for the defects in their products. In other words, the liability of suppliers is needed to achieve better consumer protection, both in the weaker sense (compensation) and in the stronger sense (deterrence).

For buyers of defective products, the suppliers from which they bought the product (assuming there is one) are often the most accessible defendants. When the product was bought in a shop, the buyer usually remembers what shop it was, and that shop will in many cases be close to where they live. Seeking redress from the person running that shop is therefore comparatively easy in practical terms and does not involve cross-border proceed-

142. *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 463, 150 P.2d 436, 442 (1944). The opinion was written by Justice Traynor, who later changed his mind as was made clear in *Vandermark v. Ford Motor Co.*, 391 P.2d 168 (Cal. 1964).

143. J. Cavico, 'The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products' (1987) 12(1) Nova L. Rev. 213, 229; R.A. Epstein, *Modern Products Liability Law: A Legal Revolution* (Quorum Books 1980) 62. These two authors put forward another argument, very close to this one, which is that 'manufacturers will sense the same, if not greater, pressure to make safe products if the manufacturers are sued directly for injuries caused by their own product defects' (Cavico, 228), rather than face recourse claims by sellers. While this may be true when the injured person has a real possibility to sue the manufacturer directly, the argument fails to convince in the EU context when the claimant and the manufacturer are not located in the same country, given the lack of cross-border claims.

144. C-52/00 *Commission v. France* [2002], ECR 2002 I-03827, ECLI:EU:C:2002:252 at 40: 'it should be pointed out that the possibility afforded to the supplier under that law of joining the producer has the effect of multiplying proceedings, a result which the direct action afforded to the victim against the producer under the conditions provided for in Article 3 of the Directive is specifically intended to avoid.'

145. I. Schwenzer and M. Schmidt, 'Extending the CISG to Non-Privity Parties' (2009) 13 Vindobona J. of Int'l Com. L. & Arbitration 109, 116.

ings (unless the product was bought while travelling or residing in another country). Many products are obviously bought online nowadays, but even then, the supplier is often established in the country where the product is being bought.[146]

Suppliers can then bring recourse claims against the manufacturers of defective products for which they have had to answer, or against intermediaries higher up the marketing chain. Being professionals, with potentially greater financial resources, easier access to legal services and fewer emotions than those directly injured by the products, they are typically in a much better position to bring claims. Contracts entered between manufacturers and suppliers will often provide a framework for such claims, and even if they bar or limit them,[147] the supplier can still act as a gatekeeper by deciding to stop distributing products that are defective and cause damage for which it must answer. To put things in more economic terms, suppliers are very often the 'cheapest cost avoiders' when it comes to minimising the costs associated with defects in products, because it is them 'who, through their ongoing relationship with the manufacturers and through contribution and indemnification in litigation, combined with their role in placing the product in the consumer's hands, [are] in the best position to pressure the manufacturers to create safer products'.[148]

b. Liability of Online Marketing Platforms

However necessary, the liability of suppliers is not enough to ensure that those injured by defective products will always have an effective means of redress. There are cases where there is no (accessible) supplier and no other accessible defendant under the PLD or the Draft PLD. In some of them, it would probably be impossible to think of an accessible defendant anyway (for example if the defective good was manufactured by a non-EU producer and bought from a local distributor while on a trip outside the EU). However, there are also cases where the position of those injured could be improved by making online retail platforms liable for damage caused by defective products sold through them.

Online retail platforms have been aptly described as 'the missing link' in EU product liability law.[149] The reasons for making them liable are manifold. They include but are not limited to those justifying the liability of distributors. They have been very convincingly put forward in two recent high-profile decisions by the California Court of Appeal, *Bolger*[150] and *Loomis*,[151] which have found that Amazon could be made liable for damage caused by defective products sold through it.[152] Only a few points need to be stressed here.

146. This is the case, for example, where products are bought online from a national retail company, as often happens.

147. Assuming that a contract can bar an indemnification claim when the distributor has been subrogated in the rights of the injured person and steps into the latter's shoes (as is possible in some legal systems).

148. C.M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1334.

149. V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 987.

150. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601 (Cal. Ct. App. 2020).

151. *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 789 (Cal. Ct. App. 2021).

152. These and other product liability cases involving online retail platforms have attracted considerable attention from US legal scholars; see eg A.R. Bullard, 'Out-Techning Products Liability: Reviving Strict Products Liability in an Age of Amazon' (2019) 20 North Carolina J. L. & Tech. 181; A. Doyer, 'Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond' (2019) 28 J. L. & Pol'y 719; E.J. Janger and A.D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259; C.M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327; R. Sprague, 'It's a Jungle Out There: Public Policy Considerations Arising From a Liability-free Amazon.com' (2020) 60 Santa Clara L. Rev. 253. In Europe, see esp. E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort

First, and this is essential for consumer protection in the weaker sense of the term, the online platform through which a product has been bought is very often the most accessible potential defendant. This was very clearly expressed in *Bolger* in relation to Amazon: 'Amazon, like conventional retailers, may be the only member of the distribution chain reasonably available to an injured plaintiff who purchases a product on its website. (…) Because imposing strict liability on Amazon would help compensate some injured plaintiffs who would otherwise go uncompensated, Amazon's inclusion within the rule [of strict liability] would promote its purposes.'[153] This holds true of any platform. As a matter of fact, bringing claims against online retail platforms is probably easier than against most other potential defendants. The identity of the platform through which a product was bought is normally known to the buyer (unlike the identity of the fulfilment service provider, if there is one, and even unlike the identity of the producer, which may be difficult to ascertain). Admittedly, many platforms are based outside the EU. However, they sometimes do business in the EU through an EU subsidiary. Even if they do not, it is easy to contact them, which is not the case of many other economic operators. Besides, platforms have a strong interest in being responsive to customers' claims, since they thrive on the frequency of purchases and since good customer experience is an essential part of their business model. In that respect, online platforms are very different from many manufacturers which are unlikely to sell their products twice to the same person and can therefore afford to treat post-sale claims offhandedly (subject to their reputation vis-a-vis future clients not being threatened).

The second reason why online retail platforms should be held liable is that they are often best placed to act as gatekeepers (and therefore to enhance consumer protection in the stronger sense of the term). As was noted by the Court in *Bolger*, and again in *Loomis*: 'Just like a conventional retailer, Amazon can use its power as a gatekeeper between an upstream supplier and the consumer to exert pressure on those upstream suppliers (here, third-party sellers) to enhance safety.'[154] This applies to all online marketing platforms, and not just Amazon. They can act at the 'upstream' level, by setting up requirements or controls which limit the risk of defective products being sold through them; and they can act at the 'downstream' level, by taking effective measures if defective products are nevertheless sold through them. Platforms can demand proof of compliance with safety regulations before they market a product and they can ban products which turn out to be defective (and which they are often in a very good position to identify, through their handling of customers' complaints). This role is crucial, given the number of unsafe products sold on the internet.[155] Making online platforms liable for defective products is a good way of encouraging them to take it seriously.

Online platforms are furthermore in an ideal position to pass on the costs of defective products. Their contractual relationship to sellers allows them to secure their right of recourse, should they have to compensate those injured by the defective products sold through them. They can therefore achieve 'a fair apportionment of the risks in the distribution chain', as was noted by the European Parliament in a 2021 study on the liability of

L. 64; C. Busch, 'When Product Liability Meets the Platform Economy: A European Perspective on Oberdorf v. Amazon' (2019) 8 J. Eur. Consumer and Market L. 173 (2019); V. Ulfbeck and P. Verbruggen, 'Online Marketplaces and Product Liability: Back to the Where We Started?' (2022) Eur. R. of Priv. L. 975, 982-87.

153. *Bolger v. Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020) (citations omitted).

154. ibid 618. This statement was later quoted in *Loomis v. Amazon.com, Inc.*, 277 Cal. Rptr. 3d 769, 784 (Cal. Ct. App. 2021).

155. See supra II.B.

online platforms.[156] In *Loomis*, the Court rightly stated (and the statement holds true of other online retail platforms than Amazon): 'Amazon can adjust the costs of consumer protection between it and third party sellers through its fees, indemnity requirements, and insurance.'[157] By contrast, refusing to make online platforms liable for defective products creates a serious risk (which has probably already materialised) that manufacturers of unsafe products established outside the EU will deliberately market them in the EU through online platforms, in order to avoid being made liable.[158] These manufacturers know that they run almost no risk of being directly sued in their own country by those injured by their products (or to have foreign judgments enforced against them), and the fact that platforms cannot be made liable means that they will not have to face recourse claims either. As the European Parliament put it in a Resolution on the DSA, there is currently a 'legal loophole which allows suppliers established outside the Union to sell online to European consumers products which do not comply with Union rules on safety and consumer protection, without being sanctioned or liable for their actions and leaving consumers with no legal means to enforce their rights or being compensated by any damages'.[159] The liability of online platforms is needed to fill that loophole.[160]

The counterarguments that have been raised against the liability of online platforms fail to convince. The objection according to which they have no possibility to inspect the products sold through them has already been disposed of when discussing the liability of distributors.[161] It has also been argued that they cannot be made liable because they never hold title to the products. While this formalistic line of reasoning has apparently had some success in the US,[162] it cannot be accepted under EU law, where the Draft PLD wants to make fulfilment service providers liable for the defective products they handle but do not own. Another argument could be that all platforms are not as powerful as Amazon and may not be able to 'control' third-party sellers as Amazon does, meaning that 'across-the-board' liability of platforms would be more difficult to bear for smaller platforms and would create a comparative advantage for the greater ones.[163] This may be true but is not a reason to reject the liability of online marketing platforms for defective products. Inequality in economic power and bargaining strength exists everywhere and affects all categories of economic operators, including manufacturers, importers, fulfilment service providers or suppliers. It seems unlikely that holding online platforms liable for defective products sold through them would prevent small platforms from developing; and even if it did, the platforms most

156. As was noted in European Parliament, Liability of Online Platforms, PE 656.318, February 2021.

157. *Loomis v. Amazon.com, Inc.,* 277 Cal. Rptr. 3d 769, 784 (Cal. Ct. App. 2021).

158. Pointing to this risk in the context of US law: E. J. Janger and A. D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259, 271; C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1335.

159. European Parliament Resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL)), § 62 <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272_EN.html#title1> accessed 12 June 2023, cited by E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 66.

160. See also ibid 64, 75.

161. See supra III.A.2.a.

162. See C. M. Sharkey, 'Products Liability in the Digital Age: Online Platforms as "Cheapest Cost Avoiders"' (2022) 73(5) Hastings Law Journal 1327, 1335, and the cases cited. Sharkey describes this approach as anachronistic.

163. C. Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' (2021) 6-9 and the authors cited <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897602> accessed 20 June 2023.

affected would be those through which too many defective products are sold, and which the EU has no interest in supporting at the expense of consumer protection.

On a more general level, the liability of online platforms for damage caused by the defective products sold through them appears as a legitimate counterpart to the role they play in the distribution process of products. Online marketing platforms are doing their best to establish themselves as the sole interlocutor of their customers, who often cannot have any direct contact with the seller.[164] Platforms also try to shape consumer expectations, including in relation to product safety.[165] Importantly, most of the reasons that have been put forward to justify that online platforms should be shielded from liability (and which have resulted in the protective provisions of the E-Commerce Directive[166] and the DSA) do not apply in relation to the dissemination of defective products.[167] Online marketing products typically play an active role in the marketing process of products and are not simply 'passively' hosting content or 'merely' conveying information.[168] Damage caused by defective products is also usually much more serious than the type of damage ordinarily caused by illegal contents accessible on platforms. Violations of privacy and intellectual property rights, damage to honour and reputation are by no means trivial matters, but bodily injuries are normally worse. Finally, there are no issues about freedom of speech involved in product liability.

The liability of both distributors and online marketing platforms thus appears as a necessary feature of an effective product liability regime. The PLD should be modified accordingly, so that those suffering damage caused by a defective product are allowed to seek redress from the supplier of the product or from the online platform through which the product was marketed, whenever there is such a supplier or platform, and regardless of whether there is an identified manufacturer, or any other potential defendant, established in the EU.[169]

164. For a demonstration of the potential omnipotence of online retail platforms, in the specific case of Amazon, see E. J. Janger and A. D. Twerski, 'The Heavy Hand of Amazon: A Seller Not a Neutral Platform' (2020) 14(2) Brook J. Corp. Fin. & Com. L. 259.
165. This was noted by the Court in *Bolger* in relation to Amazon: *Bolger v Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 617 (Cal. Ct. App. 2020).
166. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.
167. On which see eg G. Wagner, 'Haftung von Plattformen für Rechtsverletzungen', GRUR 2020, 329 and 447. See also M. C. Buiten, A. de Streel and M. Peitz, 'Rethinking liability rules for online hosting platforms' (2020) 28 Int'l J. L. Information Techn. 139.
168. E. Büyüksagis, 'Extension of Strict Liability to E-Retailers' (2022) 13(1) J. Europ. Tort L. 64, 83-84, who, however, focuses on platforms operating under the FRM model.
169. For more cautious proposals in the same direction, see C. Busch, 'Rethinking Product Liability Rules for Online Marketplaces: A Comparative Perspective' (2021) 38-43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897602 accessed 20 June 2023; ELI, 'ELI Model Rules on Online Platforms' (2020) Art. 20 <https://www.europeanlawinstitute.eu/projects-publications/completed-projects/online-platforms/> accessed 20 June 2023; European Parliament, 'Liability of Online Platforms, PE 656.318, February 2021, 63; BEUC, Product Liability 2.0 – How to make EU rules fit for consumers in the digital age', 19 <https://beuc.eu/publications/beuc-x-2020-024_product_liability_position_paper.pdf> accessed 9 June 2023.

B. Striking a Better Balance between the Interests of Consumers and Those of Producers

Enlarging the range of potential defendants under the PLD should be an absolute priority. However, the limited reliance on the Directive by those injured by defective products is probably explained not only by the difficulty to find an accessible defendant. A deeper problem is the balance struck by the PLD between the interests of injured persons and those of producers and other potentially liable persons. The stated objective that this balance should be fair can hardly be disputed. The problem with the PLD as it stands is that it is grossly unbalanced to the detriment of injured persons. Having such a low proportion of those injured by defective products being compensated thanks to the PLD means that producers are to a large extent immune to product liability as established by the Directive. However, correcting the existing imbalance should not result in the balance being tipped the other way. The challenge is to make it easier for injured persons to rely on the PLD without sacrificing the interests of producers and other potentially liable persons. In order to do so, the two main elements on which this balance is based should be considered, namely the requirement that the product be defective (1) and the defences available to the producer (2).

1. Defect

The major ingredient in the balance which the PLD strives to achieve between the various interests at stake in product liability is the choice of defect as the basis for liability. Even though this is not said explicitly, liability based on defectiveness can be considered as a middle ground between liability for fault, often thought to be too unfavourable to those injured, and purely causal liability,[170] which would presumably impose too heavy a burden on producers and other potentially liable parties.[171]

Liability based on defect is regarded as a form of strict liability,[172] and there have been endless discussions about the justifications for such liability in the context of damage caused by products. Although some authors still challenge the very idea that product liability should be strict and not simply based on fault,[173] the discussion in Europe has generally focused on which theory can best account for the imposition of strict liability, rather than on the adequateness of such liability. It is difficult to find one's way through all the arguments and reasoning put forward both in academic literature and in case law, but the predominant justification seems to be the internalisation of risk.[174] A defective product is basically a product creating an abnormal risk of damage,[175] and producers should be made

170. Such 'purely causal liability' has received different names: D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 172. It is understood here as a liability regime where the product's mere participation in the occurrence of damage would be enough to make the producer liable, without any requirement that a defect in the product be proven.
171. On the idea of a middle ground in product liability (but reacting to some perceived excesses on the part of US courts), see R. A. Epstein, 'Products Liability: The Search for the Middle Ground' (1978) 56(4) NC L. Rev. 643.
172. See supra fn. 4.
173. See supra (n 22).
174. For a presentation and tentative synthesis of the existing views, see J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 587-636.
175. As has been accepted by Cases C-503/13 and C-504/13 *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt – Die Gesundheitskasse and Betriebskrankenkasse RWE* [2015] ECLI:EU:C:2015:148, at 40 and 54.

to bear this abnormal risk which they have created. Product liability based on defectiveness is thus seen as a form of enterprise liability.[176]

While there is no room in this contribution to discuss this view, it does seem rather convincing. However, even if one accepts that strict product liability based on defectiveness constitutes a satisfactory compromise between liability for fault and purely causal liability, and that the theory of enterprise liability provides an adequate theoretical justification for it, the compromise reached by the PLD is not as good as was initially thought.

The first problem with the notion of defect is the vagueness of its definition in the Directive.[177] Basically, a product is defective 'when it does not provide the safety which a person is entitled to expect'. Admittedly, the law is fraught with vague terms and notions. They play an essential role by granting the courts some amount of discretion and by bringing flexibility into the system, but one may wonder if the PLD has not gone too far.[178] As Jane Stapleton observed, the definition it gives of 'defect' is circular.[179] To say that a product must offer the safety which one is entitled to expect amounts to answering a question (what is a defect?) with another question (what is the safety which one can legitimately expect?), the answer to which should ideally have been given by the Directive. It is hard, however, to define 'defect' more precisely. A definition that applies to all types of products and all types of defects, in any context, is necessarily open-ended. The Draft PLD is therefore right to basically keep the current definition of defect.[180] Changing for another test would not have made the content of defectiveness any clearer but would have fuelled endless discussions about the continuity or discontinuity between the 'old' and the 'new' concept of 'defect'.[181]

A second problem with defect is that its main benefit for claimants, namely the strict nature of the liability it establishes, is somewhat of a *trompe-l'œil*. As has been shown by

176. On which see eg G. L. Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14 J. Leg. Stud. 461.

177. Article 6 provides: '1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including: (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation. 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.'

178. On the costs of vagueness in product liability law, see eg D. More, 'Re-Examing Strict Products Liability's Goals and Justifications' (1989) 9 Tel Aviv U. Stud. L. 165, 167-68, 202.

179. J. Stapleton, *Product Liability* (1994) 234: 'The core theoretical problem with the definition, however, is that it is circular. This is because what a person is entitled to expect is the very question a definition of defect should be answering.' See also S. Whittaker, 'The EEC Directive on Product Liability' (1986) 5 Yearbook of European Law 233, 242.

180. Article 6(1) of the Draft PLD reads: 'A product shall be considered defective when it does not provide the safety which the public at large is entitled to expect.' At first glance, it might be doubted if the test is the same as in the current PLD, since the latter speaks, in its English version, of 'the safety which a person [and not the public at large] is entitled to expect'. However, it has long been accepted that the test for defectiveness is an objective one and does not depend on the expectations of a specific person or user. The new wording is intended to reflect this, as is confirmed by Recital 22 of the Draft: 'The assessment of defectiveness should involve an objective analysis and not refer to the safety that any particular person is entitled to expect.'

181. Another improvement over the current Directive is that the Draft PLD extends the (non-exclusive) list of factors that should be considered when assessing the legitimate expectations of the 'public at large', thus making the characterisation of defectiveness hopefully more predictable. However, it is unfortunate that, unlike the ELI Draft (Art. 7(1)), the PLD draft does not refer to the safety which the product should provide according to its design, since comparison between the actual product and its intended design is a practical and most common way of assessing manufacturing defects.

many authors, liability based on defectiveness is not always true strict liability.[182] It depends on the type of defect at stake. Although the PLD adopts a unitary conception of defectiveness, in practice, a distinction must inevitably be made between three types of defects: manufacturing defects, design defects and instruction defects.[183] Manufacturing defects consist in a (dangerous) discrepancy between the actual product and its intended design.[184] They normally affect only certain items of a product. Design defects, as indicated by their name, are due to a flaw in the product's design and therefore affect all items of the product. Both manufacturing and design defects can be called intrinsic defects, as opposed to instruction defects, which are extrinsic to the product. An instruction defect arises when it is not the intrinsic characteristics of the product that make it unreasonably dangerous, but the (lack of) information or instruction provided with the product that makes its use more dangerous than it should be.

Manufacturing defects are typically proven by comparing the product that caused the damage with its intended design. The claimant thus does not have to demonstrate that the defendant breached a duty to behave in a certain way, meaning that liability for manufacturing defects is truly independent from fault, ie strict. By contrast, proof of a design or instruction defect normally requires demonstrating that the product was not designed as it should have been or that the required information or instructions were not provided, ie that someone (though not necessarily the producer) did not behave as they should have and breached a duty to take reasonable care. Liability for design and instruction defects is thus not substantially different from liability for fault, even though the fault that the claimant needs to demonstrate need not be attributed to the producer (or the defendant, if different from the producer).

Defect as a ground for liability is therefore not a panacea. It comes at a heavy administrative cost,[185] due to the difficulty in defining the notion, to the need to distinguish between several types of defects, and to the difficulty in establishing defectiveness in practice, which often amounts to proving fault.

On the other hand, imposing purely causal liability for damage caused by products is clearly not on the agenda and seems unreasonable. It would require a complex set of defences.[186] Furthermore, a general no-fault compensation scheme for all accidents, as was created in New Zealand in 1972, is out of the question, for political reasons and because the EU has no competence to impose such a system on the Member States.[187] A weaker version of causal

182. For a clear and convincing demonstration, see eg J. Stapleton, 'The conceptual imprecision of "strict" product liability' (1998) 6 Torts Law Journal 260. The literature on this issue has long been very abundant, as is apparent from the references cited by J.-S. Borghetti, *La Responsabilité du fait des produits. Étude de droit comparé* (LGDJ 2004) 471.

183. This distinction became a basic feature of US product liability law long ago; see J. G. Fleming, 'Of Dangerous and Defective Products' (1989) 9 Tel Aviv U. Stud. L. 11, 13ff.

184. They are called 'manufacturing' defects because this discrepancy typically originates in the manufacturing process, though this is not necessarily the case.

185. J. G. Fleming, 'Of Dangerous and Defective Products' (1989) 9 Tel Aviv U. Stud. L. 11, 13.

186. Specific defences would be needed to avoid producers being made liable for damage caused by the known and unavoidable risks of their products. For instance, it would make no sense to have the producer of a 'normal' knife be made liable for every single injury caused by its product.

187. New Zealand famously established a no-fault compensation system for all injuries with the New Zealand Accident Compensation Act 1972. That system attracted wide attention and praise among tort law scholars in the 1970s and 1980s, but interest in it has now declined, partly due to a shift away from strict liability and no-fault compensation schemes in academic legal thinking. For a presentation of the New Zealand Compensation Scheme, as now governed by the Accident Compensation Act 2001, see C. Hodges and S. MacLeod, 'New Zealand: The Accident Compensation Scheme' in C. Hodges and S. MacLeod (eds), *Redress Schemes for Personal Injuries* (Hart Publishing 2017) 33.

liability would be to switch the burden of proving defect, so that defectiveness would be presumed whenever a product causes damage, and the producer would have to demonstrate that the product was not defective or that damage was not caused by the product's defect. Such a rule has sometimes been advocated, especially by consumer associations or associations of victims of pharmaceuticals. It may be well suited for certain types of products or situations, but it is too radical to be applied across the board. Since the PLD is a general instrument that is potentially applicable to all types of products and situations,[188] the best solution is probably to keep defectiveness as the basis for liability, and to leave the burden of proving defect on the claimant as a matter of principle.

This is what the Draft PLD does, while at the same time making it easier to prove defect or causation by creating a disclosure procedure (Article 8) and reversing the burden of proof of causation and/or defect in certain cases (Article 9). These two provisions have been analysed in detail elsewhere and need not be discussed at length here.[189] Suffice to say that they go in the right direction, by making it easier for injured persons to claim compensation in some cases without radically upsetting the balance of interests at the expense of producers.

However, it should be stressed that the combination of defect as the ground for liability under the PLD and the proximity between defect and fault has potent consequences on the interaction between the Directive's regime and other liability regimes. This interaction is governed by Article 13 of the PLD according to which: 'This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified.' The rule in this provision was interpreted restrictively by the CJEC and can be restated as follows:[190] within its scope of application, the PLD bans the application of national liability regimes based on the same ground (defectiveness),[191] but it does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects. The Draft PLD intends to carry the rule over (Article 2(3)(c)).

Where a product has a design or instruction defect, and assuming that defect can be proven, the injured party will often be able to demonstrate the producer's or someone else's fault as well. They will then have an option between relying on the PLD regime and relying on the applicable national fault-based liability regime to seek compensation. The product's defect in the sense of the PLD may also coincide with a latent defect in the sense of the warranty for latent defects, as exists in certain Member States, the application of which was

188. The generality of the PLD may be criticised. There are good reasons why pharmaceuticals should be subject to specific liability rules, as is the case in Germany with the 1976 *Arzneimittelgesetz* (AMG), or even to a no-fault compensation system, as seems to be the case in Scandinavian countries (see C. Bloth, *Produkthaftung in Schweden, Norwegen und Dänemark* (Verlag Recht und Wirtschaft 1993) 325-42). However, despite recognising that pharmaceuticals raise specific difficulties, especially as far as causation is concerned (see COM (2018) 246 final, passim), the European Commission has eventually decided to keep them within the scope of the PLD.

189. See eg see J.-S. Borghetti, 'Adapting Product Liability to Digitalization: Trying Not to Put New Wine Into Old Wineskins' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 129, 159-63; E. Dacoronia, 'Burden of proof – How to handle a possible need for facilitating the victim's burden of proof for AI damage?' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 201; G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191, 216-18.

190. See esp. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255, at 31.

191. Unless it is a special liability system that existed when the PLD was modified. In practice, this exception only covers the German strict liability regime applicable to pharmaceuticals (AMG, see supra fn. 188), also based on defectiveness.

expressly accepted in the context of product liability by the CJEC.[192] In such cases, and where the claimant can sue the producer based on the warranty,[193] there will also be an option between the PLD and a purely national regime.

It is therefore often the case that someone having suffered damage caused by a defective product can prove the existence of another ground for liability than defect and can rely on at least one purely national liability regime to claim damages against the producer or another person potentially liable under the PLD.[194] As a result, relying on the Directive's regime is interesting for claimants only if the other features of this regime, apart from the ground for liability, are more favourable to them than those of purely national regimes. This, however, is not always the case. First, some types of damage may be covered by a national liability regime, but not by the PLD, in which case the injured party has no choice but to rely on the former (possibly in addition to the latter) if they want to be fully compensated.[195] Second, the many defences available to producers and other defendants under the PLD result in that regime being sometimes less favourable to claimants than national fault-based regimes, let alone strict liability ones. As a result, in many Member States, those suffering damage caused by products keep invoking purely national rules, either cumulatively with the PLD regime or on a stand-alone basis. If the PLD is to successfully 'compete' with other liability regimes based on other grounds, it is therefore necessary to address the issue of defences, which will be discussed in the next section, and that of damage.

Article 9(1) defines 'damage' as death or bodily injuries and damage to property other than the defective product itself, with a lower threshold of € 500, provided the item of property (i) is of a type ordinarily intended for private use or consumption, and (ii) was used by the injured person mainly for his own private use or consumption. The CJEC took the position that damage not covered by the definition given at Article 9, such as damage to professional property, is outside the scope of the PLD.[196] This is a source of complexity, as there can be doubts as to whether a given harm falls with the definition of 'damage' in the

192. C-183/00 *María Victoria González Sánchez v. Medicina Asturiana SA* [2002] ECR 2002 I-03901, ECLI:EU:C:2002:255, at 31.

193. This is the case in France, where the warranty for latent defects cannot be set aside and is transferred along with the product sold, so that the end-buyer can sue the producer based on the warranty arising out of the initial sales contract entered into by the producer; see J.-S. Borghetti, 'Breach of contract and liability to third parties in French law: how to break deadlock?' (2010) Zeitschrift für europäisches Privatrecht 279, 284-85.

194. The CJEC ruled that only 'operators who have taken part in the manufacture and marketing processes' of the product (such as producers, importers and suppliers) are included within the PLD's scope: C-402/03 *Skov Æg v. Bilka Lavprisvarehus A/S and Bilka Lavprisvarehus A/S v. Jette Mikkelsen and Michael Due Nielsen* [2006], ECR 2006 I-00199, ECLI:EU:C:2006:6. By contrast, the liability of service providers is not covered by the PLD and a national law can make a service provider liable for damage caused by a defective product used to perform that service, as is the case in France: C-495/10 *Centre hospitalier universitaire de Besançon v. Thomas Dutrueux and Caisse primaire d'assurance maladie du Jura* [2011] ECLI:EU:C:2011:869.

195. This used to be the case for example in German law until 2002, when the compensation for non-pecuniary losses was possible under the ordinary rules on fault liability, but not under the (officially) strict liability rules transposing the PLD.

196. C-285/08 *Moteurs Leroy Somer v. Dalkia France and Ace Europe* [2009] ECR 2009 I-04733, ECLI:EU:C:2009:351. As a result, Member States are free to deal with that type of damage as they wish, including by having it covered by the PLD regime; but this latter option seems to have been adopted only in France (Article 1245-1 of the *Code Civil*).

Directive.[197] More importantly, by not covering damage to professional property,[198] which has rightly been described as the most important issue in relation to property damage,[199] the drafters of the PLD have deliberately limited the harmonising effect of the Directive.[200] This choice runs directly against the PLD's primary policy objective, which is the harmonisation of product liability for the sake of the achievement of a truly common market. It cannot be explained by the consumer protection objective.[201] Its motivation was likely the desire to limit the potential financial burden on producers, as well as the idea that such damage is best handled through contract law and the specific terms agreed upon by those providing and those using the products causing damage. This makes sense but cannot be reconciled with the PLD's stated aim.

Unfortunately, the Draft PLD basically sticks to the same solution,[202] and even makes it clear that damage caused to legal persons is not within the Directive's scope of application (Articles 1 and 5). Yet, if the PLD is to truly harmonise product liability across the EU, it should be made applicable to all types of property damage (except damage to the defective product itself), including damage to professional property, regardless of whether it is owned by a natural or a legal person.[203] This would increase the burden on producers and other potential defendants, but only to a limited extent, since liability under the PLD often comes very close to liability for fault, to which they are subject anyhow. Limitation and exclusion clauses should also be accepted in relation to damage to professional property, subject to the same conditions as those normally applicable under national law.[204] Besides, there is no reason why insurance would not be available.[205]

197. For an example, see C-203/99 *Henning Veedfald v. Århus Amtskommune* [2001] ECR 2001 I-03569, ECLI:EU:C:2001:258. The case concerned a defective product that had caused the loss of a kidney intended for transplantation.
198. The drafters of the PLD have also limited its scope of application by leaving non-pecuniary losses out (Article 9(2)). However, this has a smaller impact in practice than the exclusion of damage to professional property.
199. I. Schwenzer, 'Products Liability and Property Damages' (1989) 9 Tel Aviv U. Stud. L. 127, 129.
200. Damage to property can be extremely important in practice. For instance, the fire that broke out in 1999 in the Mont-Blanc Tunnel (connecting France and Italy) caused several casualties but also tens if not hundreds of millions of euros of damage to professional property (and consequential losses). Assuming that it was caused by a defective engine, as has been surmised, the liability of the producer would have fallen only partially within the PLD's scope and its damage to property limb might have been decided differently depending on whether it was governed by French or by Italian law.
201. Admittedly, the fact that the PLD covers damage caused to goods intended and used for private purposes, but not damage caused to professional property, stresses the importance of consumer protection by contrast. However, including damage to professional property within the Directive's scope would not take anything away from consumers.
202. Article 4(6). The provision slightly extends the scope of recoverable primary harm, by broadening the definition of bodily injuries, by suppressing the €500 threshold in case of damage to property and by including damage caused to property used only partially for professional purposes as well as loss or corruption of data. The other possible types of primary harm, including damage to professional property and pure economic loss, are not mentioned and presumably remain outside the Directive's scope; see J.-S. Borghetti, 'Adapting Product Liability to Digitalization: Trying Not to Put New Wine into Old Wineskins' in S. Lohsse, R. Schulze and D. Staudenmayer, *Liability for AI* (Nomos 2023) 129, 140-43.
203. G. Wagner, 'Liability Rules for the Digital Age – Aiming for the Brussels Effect' (2022) 13(3) J. Europ. Tort L. 191, 209.
204. The latter solution has been adopted in France (Art. 1245-14(2) of the *Code Civil*), where the provisions implementing the PLD cover damage to professional property: see supra (fn. 196).
205. Insurance comes at a cost, of course, but it is doubtful if this extension of product liability would entail a significant rise in insurance premiums, the share of which in producers' cost structure seems rather low.

2. Defences

Defences are an essential part of any liability regime and play a crucial role in balancing the interests of potential claimants and defendants. They are also a major factor of complexity, and a major fuel for litigation. The more defences are available to defendants, the more occasions there are for discussion and disputes. A balance therefore needs to be struck between preserving the legitimate interests of defendants and accumulating grounds for discussion and/or litigation at the expense of the injured parties. Examples in national legal systems confirm that limiting the number of defences is an effective means of containing litigation and promoting settlements, including in strict liability regimes.[206]

With its six specific defences (Article 7), coming on top of comparative fault (Article 8(2)) and two distinct limitation periods (Articles 10 and 11),[207] the PLD stands out as a very and probably too sophisticated liability regime. The Draft PLD continues in this vein and contains basically the same defences (at Articles 10, 12(2) and 14), with an additional factor of complexity arising out of the necessity to consider possible updates and upgrades of products with a digital element (Article 10(2)).[208] Yet, if the PLD is to be a reasonably consumer-friendly regime, it should limit the defences available to manufacturers and other potential defendants. Two of them will be discussed here, which stand out as sources of unnecessary complications and litigation: the development risk defence (a) and the ten-year long-stop period (b).

a. The Development Risk Defence

The development risk defence has given rise to endless discussions and debates, especially during the PLD's adoption and the transposition process, and its political and symbolic importance cannot be underrated. Many see it as the symbol and condition of the preservation of the producers' interests in European product liability. However, a closer analysis suggests that the costs associated with it greatly exceed any benefit it can bring in terms of protecting producers against unfair claims.

Only in exceptional cases has the development risk defence been accepted by the courts. In France, there is only one judgment by the *Cour de Cassation*[209] where the defendant was able to escape liability by relying on it,[210] and it is open to criticism since it concerned a manufacturing defect and the applicability of the defence to such defects has been disputed.[211] There are also a few French appellate court cases in which the defence was accepted in relation to a pharmaceutical, but they all concern the same product and appear to have been justified on mostly procedural grounds, due to the claimants failing to challenge the

206. For instance, in France, simplification of liability for traffic accidents has been achieved not so much by switching from fault-based to strict liability, as by reducing the number of defences available to defendants: see J.-S. Borghetti, 'Extra-Strict Liability for Traffic Accidents in France' (2018) 53(2) Wake Forest L. Rev. 265.

207. While Article 11 sets out a ten-year 'long-top' limitation period, discussed in the section above, article 10 provides for a three-year limitation period, which starts to run from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.

208. The Draft also suppresses the possibility for Member States to set aside the development risk defence.

209. France's highest court in civil and criminal matters.

210. Cass. 1re civ., 5 May 2021, n° 19-25102.

211. The debate on this issue is still ongoing in several countries: see the comparative overview in D. Fairgrieve and R. Goldberg, *Product Liability* (3rd edn, Oxford University Press 2020) §§ 13.110-13.124.

defendant's arguments as to the existence of a development risk.[212] Nowhere in the EU does there seem to be a significant number of cases where the defence was accepted.

This is hardly surprising. Proving that 'the state of scientific and technical knowledge at the time when [the producer] put the product into circulation was not such as to enable the existence of the defect to be discovered' is not easy, especially in the age of the internet (and sophisticated automated translators), where information is so readily available. Also, to assess the development risk defence, judges must put themselves in the situation of the producer at the time the product was put into circulation, which is very difficult. With the benefit of hindsight, they probably tend to consider that the risk which eventually caused the damage could have been known at the time when the product was put into circulation, even if that was not the case. The relevance of the development risk defence is further weakened by the fact that it is the moment when the precise item that caused damage was put into circulation which must be considered to assess whether the defect could be discovered, and not the moment when the product type was first put into circulation. Besides, many national legal systems recognise some sort of duty to monitor risks after the product has been put into circulation.[213] As a result, even if the defect could not be discovered when the product was put into circulation, the producer may still be liable based on fault if it failed to adequately monitor the product between that moment and the time when the product was used or consumed by the victim.

The policy arguments in favour of the development risk defence also fail to convince. It has sometimes been written that defects caused by unknown risks cannot be insured because they are not predictable,[214] but this sounds more like a play on words. Design or instruction defects caused by risks that could have been identified by the producer may be predictable in theory,[215] as opposed to defects caused by risks that were unknowable, but, in practice, none of these defects is ever predicted in advance by the insurer – or it would have refused to insure the producer in the first place. The existence of a given design or instruction defect always comes as a surprise to the insurer. Besides, if one is to judge based on published cases, the number of defects attributable to undiscoverable defects is so low in practice that extending liability to such defects could not have a significant effect on insurance premiums.

It is also sometimes said that making producers liable for unknown risks would deter some companies from developing products, or from marketing them in certain countries, for fear of being made liable. This would be the case especially in the pharmaceutical industry and in new technologies. The argument may be received with a certain amount of scepticism. There is not much evidence suggesting that companies seriously consider the applicable liability rules before developing a product or entering a new market. As has been seen earlier, the risk of incurring civil liability probably has a very limited impact on the behaviour of economic operators generally.[216] This must be even truer of the risk of not being

212. See J.-S. Borghetti, 'La Cour de cassation admet pour la première fois le jeu de l'exonération pour risque de développement' (2021) 4 Revue des contrats 27, 31. In an earlier case concerning the same pharmaceutical, the *Cour de Cassation* had confirmed the rejection of the development risk defence by the appellate court, and some claimants had apparently taken the rejection of the defence for granted in later cases.

213. P. Machnikowski, 'Producers' Liability in the EC Expert Group Report on Liability for AI' (2020) 11(2) J. Eur. Tort L. 2020 137, 141.

214. See eg P. Trimarchi, *La responsabilità civile: atti illeciti, rischio, danno* (Giuffrè Editore 2017), § 18.3.

215. There may be cases were manufacturing defects are predictable, for instance if it is known that the manufacturing process will statistically result in one out of N items of the product not conforming to its design.

216. See supra II.A.1.

able to *escape* liability in the future if a defect which is by definition hypothetical at the time of the decision materialises at a later stage.[217] Finally, the example of vaccines against Covid-19 has shown that, when a product is considered as vital for the community, there are ways to shield producers from potential liability.[218]

While the dangers of suppressing the development risk defence are not obvious, the costs associated with it are quite clear. Even if the defence has very rarely been accepted by the courts, it is often put forward by defendants (at least in France) and gives rise to lengthy discussions and disputes. This may not get better in the future, since 'the objective state of scientific and technical knowledge at the time when the product was placed on the market', to which Article 10(1)(e) of the Draft PLD refers, will never be easy to ascertain, especially in retrospect. Even when the defect was in fact not undiscoverable, the development risk defence can be brandished as a threat to dissuade victims from claiming or suing.

A further reason to suppress the defence is the development of AI and 'self-learning' products, and the possibility that some products will behave in a way that was totally unpredictable at the time when they were put on the market. When unpredictability is a consubstantial feature of a product, the manufacturer should bear the risk associated with it, which is a typical risk of the product, and should not be allowed to escape liability by arguing that the product's uncontrolled evolution resulted in the occurrence of a defect that could not be known when the product was put on the market.[219]

Getting away with the development risk defence would therefore simplify the PLD regime and suppress a pretext for delays and chicanery, without significantly increasing the burden on producers.

b. The Long-Stop Period

The ten-year 'long-stop' limitation period which starts to run with the product being put into circulation (Article 11 of the PLD) is a major obstacle for claimants, especially in cases involving pharmaceuticals, where side effects may occur a (very) long time after the patient was exposed to the product and where establishing a causal relationship between the use of the product and these effects can also be a lengthy and difficult process. This long-stop is officially justified by the fact that 'higher safety standards are developed and the state of science and technology progresses', so that 'it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product' (Recital 11). Both the mechanism and its justification have been carried over into the Draft PLD (Article 14(2) and Recital 43). Yet, the justification fails to convince. Under both Article 6 of the PLD and Article 6 the Draft PLD, defectiveness must be assessed at the time the product was put into circulation and a product must not be considered defective for the sole reason that a better product is subsequently put into circulation. The existence of a defect is thus independent from the moment at which it is appreciated, and there is no reason why the increase in safety standards or the progress of science should influence this moment.

217. On the equivocal conclusions of economic analysis as to the desirability of the development risk defence, see M. Faure, 'Economic Analysis of Product Liability' in P. Machnikowski (ed.), *European Product Liability. An Analysis of the State of the Art in the Era of New technologies* (Intersentia 2016) 619, §§ 87-88.

218. D. Fairgrieve, P. Feldschreiber, G. Howells and M. Pilgerstorfer, 'Products in a Pandemic: Liability for Medical Products and the Fight against Covid-19' (2020) 11 Eur. J. Risk Regulation 565.

219. P. Machnikowski, 'Producers' Liability in the EC Expert Group Report on Liability for AI' (2020) 11(2) J. Eur. Tort L. 2020 137, 146, reflecting on 'Key Finding 14 of Expert Group on Liability and New Technologies – New Technologies Formation, Liability for Artificial Intelligence and Other Emerging Digital Technologies' (2019) <https://data.europa.eu/doi/10.2838/573689> accessed 30 May 2023.

The real reasons for the long-stop period are elsewhere. It is intended above all to limit the liability of producers, especially in the pharmaceutical industry, and the problem is that it does it too well. When a product has long-term negative effects, applying a ten-year bar to liability amounts to granting immunity to the producer. This can hardly be regarded as a 'fair balance' between the interests of injured persons and those of producers. The PLD is not applicable *ratione temporis* to Thalidomide/Contergan-related damage, but even if it were, the women suffering from medical problems due to *in utero* exposure to the product could never be compensated under it because of the ten-year long-stop period. The unfairness of this ten-year limit has been confirmed, though somewhat indirectly, by the European Court of Human Rights. In its *Howald Moor* judgment, the Court took the view that the application of a ten-year limitation period expiring before it was scientifically possible for a person to know that they were suffering from a certain disease, and thus to bring a claim for compensation, violated their right to a fair trial as established by Article 6(1) of the European Convention on Human Rights (ECHR).[220] While the judgment was based on a Swiss case unrelated to the PLD, there is no doubt that the application of the ten-year long-stop period of the PLD could likewise lead to such a violation.

The other reason put forward to justify the long-stop period is insurability. Only if liability is limited in time can it be adequately covered by insurance, or so the argument goes. This, again, is not obvious. Insurance practices vary between countries, but claims-made insurance policies do seem to be rather common, and they apply to any claim reported during the policy period, regardless of the moment when the insured event occurred. In some countries like France, long-stop periods did not exist until recently and this did not hamper the availability of insurance for producers (nor the development of a thriving insurance market). Besides, even assuming that a long-stop period is needed or at least helpful for insurance purposes, it need not be as short as ten years. A longer long-stop period would presumably result in (slightly) higher premiums but would not lead to an impossibility for producers to get insurance.

The awareness that a ten-year long-stop period is very short for products like pharmaceuticals and the risk that the application of the PLD should result in a violation of the ECHR have resulted in the Draft PLD extending the long-stop period to 15 years where an injured person has not been able to initiate proceedings within 10 years 'due to the latency of a personal injury' (Article 14(3)). However, the solution is hardly satisfactory, since the latency period of a personal injury can be much longer than 15 years, as the Thalidomide/Contergan cases demonstrate.

To avoid any contradiction between EU law and the ECHR, and for the sake of consumer protection, the best solution would be to suppress the long-stop period altogether in case of bodily injuries. This would increase the burden on some economic operators, but the example of those Member States that have refused, abolished, or extended long-stop periods in case of personal injuries, demonstrates that it is a manageable burden, for which insurance can be found.

Both the development risk defence and (for bodily injuries only) the long-stop period should therefore be abolished. This would have a positive impact on consumer protection without imposing an unfair burden on producers or other economic operators. If a choice had to be made between these two measures, the suppression of the long-stop period in case of bodily injuries should be favoured. This would avoid pharmaceuticals (or other products) with long-term side effects being in effect liability-proof. However, the PLD is currently

220. *Howald Moor and Others v. Switzerland*, App nos 52067/10 and 41072/11 (ECtHR, 11 March 2014).

applied so sparingly that the combination of both measures could hardly result in an unfair pressure on producers.

Conclusion

There is a huge gap between the relevance of the PLD for European private law from a theoretical point of view and its practical effects. The Directive is a wonderful legal topic, raising many fascinating issues, but it is a very disappointing instrument when it comes to achieving a truly common market and enhancing consumer protection, which are the objectives officially assigned to it. The problem is deep-rooted. Harmonising product liability is simply not helpful for the establishment of a common market and it cannot have a significant effect on consumer protection in the stronger sense of the term (ie deterring producers from putting dangerous products on the market). The only useful thing which the PLD could do would be to enhance consumer protection in the weaker sense of the term by making it easier for those injured by defective products to be compensated than is the case under purely national rules. Unfortunately, the Directive does not even do that, and the features of the liability it establishes make it in practice quite difficult for those injured to find an accessible defendant that will compensate them. The figures we have, however patchy, confirm that the PLD has little practical relevance. The most worrying observation is that there are almost no cross-border claims based on the Directive. This means that, in practice, many producers are immune to liability and innumerable consumers are left without a remedy under the PLD.

This can be neither ignored nor accepted and must be considered when reforming the PLD. The Draft that is currently under discussion is a unique occasion to address the Directive's shortcomings, and it cannot be concerned only with adapting product liability to software and digital products generally. The digitalisation of the economy is a major issue, but simply extending the scope of application of an ineffective instrument makes little sense. Some of the PLD's current features must be revised so that the instrument can effectively enhance consumer protection by making it easier for those injured by defective products to be compensated. This can be done without upsetting the balance between the interests of the various stakeholders. Defectiveness can be retained as the ground for product liability, but a couple of defences need to be revised or suppressed. More importantly, the range of potential defendants needs to be broadened. The PLD as it stands does not meet the challenges of Europeanisation and globalisation, because it rests on the false assumption that it is enough for those injured by defective products to have a defendant against which to turn somewhere in the EU. However, claimants and claims do not cross borders as easily as products. The common market may be a reality, but the EU is still far from being a unified jurisdiction. Those injured by defective products must therefore be allowed to sue the suppliers of these products as well as the online retail platforms through which they were sold as a matter of principle. Only then will the PLD truly benefit consumers and justify the vast amount of time, intelligence and efforts which European lawyers and institutions have invested in product liability for almost five decades.

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Laurence Burgorgue-Larsen, *Les trois Cours régionales des droits de l'homme* in context (2nd edn, Paris Pedone 2023) 598.

A MODEL OF DOCTRINAL PLURALISM?

Julie ***Ferrero***[1]

Some doctrinal works participate so significantly in the understanding of legal phenomena that they become unmissable. Others become essential on account of the reflection they develop or due to the originality of their approach and thought. The work reviewed here belongs to those two categories, both because the information it contains on the regional courts of human rights is precise, complete and invaluable, and because the approach which underlies it is fundamental and belongs to a necessary movement of renewal of the theory of international law in general and of international human rights law in particular[2].

Les 3 Cours Régionales des Droits de l'Homme in Context – *La Justice qui n'Allait pas de Soi* was written by Professor Laurence Burgorgue-Larsen. Adopting a fiction-like and fluid style, the author offers the reader an immersion into the regional courts of human rights on the African, American and European continents. Far from simply writing a comment on their case law or a description of their institutional architecture, she provides a fascinating critical analysis of each aspect of their creation and activities. Her ambition – which is obviously successful – of offering a global and at the same time subtle vision of the phenomenon is an invitation for the reader to set out on a voyage around the world and through time, starting from the middle of last century, and to live through the foundational moments of the three courts that are the focus of the book. After the 'preliminary chapter' – which is only so in name, so enlightening are its developments on the specific features of each court –, the book is structured around the courts' 'evolution', 'interpretation' and 'application' of the human rights whose protection they are entrusted with, which allows to very closely follow their realisations and the obstacles they face. Such proximity with the object of the study is made possible by the experience of the author in that field which places her so close to the inside – though she presents herself as an *outsider* – that she masters all its inner workings and subtleties. Laurence Burgorgue-Larsen is one of the pioneers of the

1. Julie Ferrero is a Professor of Public Law at Jean Moulin Lyon III University.
2. The recent publication of its second edition, less than three years after the first, demonstrates the topicality of the work and the success of the approach.

study of the Inter-American Court of Human Rights in France[3] and of the African Court upon which she writes a chronicle in the Human Rights Quarterly. There is no need to demonstrate how well she masters European human rights litigation either, which is shown by the long list of her publications in that field.[4] This book itself however is the fruit of a maturation of her thought, of the adoption of a perspective on the multiple realities that she observes, on the evolution of the systems she has studied and those who make them work that only such considerable expertise may offer. From a strictly formal point of view, the impressive thematic bibliography which accompanies the text must be acknowledged and is already an invaluable tool for whoever starts any research in the field of international human rights law.

However, beyond those advantages which show the quality and usefulness of the book here reviewed, the main praise should be reserved for its scope. The global holistic approach of the author accounts for a material, institutional and above all intellectual de-compartmentalisation which, though it is specifically tackled with in the second part, could well be the common thread of her work. Indeed, the text is important for the understanding of the functioning of international human rights law today but also for the apprehension of the movements at play within it and its uncertainties at a time when rights are being more challenged, or even threatened, than ever. Other issues, which are as important from a doctrinal point of view, lie under the text. In the introduction, the author makes a promise which is far from trivial – that of avoiding as much as possible the epistemological biases inherent in a European observer of those phenomena, while admitting that some of them may remain.[5] At a time when critical theories call for the deconstructing of dominant discourses, when the Western prevalence on international law is being questioned even within the teaching of the discipline,[6] the commitment of the book which places on the same level three geographical realities and three different contexts within a real comparative approach is important. Without making it an explicit claim, the discourse participates in a necessary movement of de-compartmentalisation in that it removes 'administrative or psychological partitions which prevent relations among several intellectual disciplines, or two or several human groups, bodies or countries.'[7] The following lines aim not to comment on the considerable mass of information which is fluidly provided in a text that sometimes reads like a novel[8] and is already considered to be a reference in its field, but to underline the importance of the doctrinal approach that underlies it. The de-compartmentalised scientific approach of the author is an invitation to reconsider the role and responsibility of the researcher and professor in the building of the discourse, and the values and biases the latter conveys. Beyond the study of the de-compartmentalisation of the three systems under study, however, the perspective that is broadly adopted is that of a pluralism which has been repeatedly called for as an antidote against persisting Eurocentrism, in international law in

3. See in particular L. Burgorgue-Larsen, A. Ubeda De Torres, *Les grandes décisions de la Cour interaméricaine des droits de l'Homme* (Bruylant 2008).
4. <https://www.pantheonsorbonne.fr/page-perso/burgorguel/> accessed 5 november 2023.
5. 19.
6. See C. Schwobel-Patel, 'Teaching International Law from a Critical Angle', vol. 2, (2013) *Recht En Methode*, 67; C. Schwobel-Patel, *Teaching International Law*, Oxford (OUP 2018).
7. Centre national de ressource textuelle et lexicale, <https://www.cnrtl.fr/definition/decloisonner> accessed 5 november 2023.
8. See in particular the developments on the great men and women who have written the history of the regional protection of human rights, eg, 220ff.

general and in human rights in particular, and which affects the normative production and international institutions as much as teaching and research in that field.[9]

To underline it, the first part of this review will provide an analysis of the de-compartmentalisation of the law (I) and the second will highlight the doctrinal de-compartmentalisation in which this book participates (II).

I. De-compartmentalising the law

The 'de-compartmentalised' approach of the book directly derives from the studied phenomena which offer the observer multiple examples of bridges between the different regional systems,[10] from a normative point of view (A.), as well as from an institutional one (B.).

A. Normative de-compartmentalising: the corpus iuris *of international human rights law*

Among the key features of the analysis conducted in *Les 3 Cours Régionales des Droits de l'Homme* in Context, the developments about interpretation are unquestionably some of the most important. Rather than taking stock of the techniques used by judges, the second part of the book first undertakes to demonstrate the existence of an interpretative de-compartmentalisation and its effects. That lens allows not only to highlight the mechanics working in each courtroom, but, more importantly, to shed light on a general movement that involves both progress and tension. That interpretative de-compartmentalisation is presented as 'the opening onto external sources. A global opening which does not take much into account the nature of the tools that are being used. Soft and hard work alongside one another.'[11] It is ultimately an extremely liberal variant of the rule of Article 31 § 3c VCLT pursuant to which the interpretation of a provision must take into consideration 'any relevant rules of international law applicable in the relations between the parties'. However, the doctrine has already highlighted the potential of 'systemic integration' implied in this article and the fact that human rights courts have appropriated and pushed it to its breaking point. That principle of systemic integration may be defined, following Vassilis P. Tzevelekos, as the method consisting in interpreting a provision 'in a manner that safeguards harmony within the broader normative environment – that is, the international legal order.'[12] Two major consequences ensue from that interpretative dynamic. First, it participates in a form of substantial harmonisation of the protected rights which allows to put into

9. See on that matter M. M. Mbengue, O.D. Akinkugbe, 'Countering and pluralizing the research, teaching, and practice of Eurocentric international law' in A. van Aaken, P. d'Argent, Lauri Malksoo, J.J. Vasel (eds), *The Oxford Handbook of international law in Europe* (OUP 2023).
10. J. Cazala, 'Le rôle de l'interprétation des traités à la lumière de toute autre "règle pertinente de droit international applicable entre les parties" en tant que "passerelle" jetée entre systèmes juridiques différents' in H. Ruiz Fabri, L. Gradoni, *La circulation des concepts juridiques: le droit international entre mondialisation et fragmentation* (Société de législation comparée 2009) 95-136.
11. 255.
12. See in particular V.P. Tzevelekos, 'The use of article 31 (3) (C) of the VCLT in the case law of the ECtHR: an effective anti-fragmentation tool or a selective loophole for the reinforcement of human rights teleology: between evolution and systemic integration', vol. 31, (2009-2010), *Michigan Journal of International Law* 621-90.

perspective not only the assumption of the supremacy of a system over the others, but also that of a fragmentation of the legal *corpus* into different regional spheres. It then contributes to the final scrapping of old worries of case law inconsistencies resulting from the proliferation of international courts that some have mentioned.[13] Then, and above all, its plays a fundamental role in the power struggle which opposes States and international courts. Resorting to the rules and case law from other systems is at the same time a factor of legitimisation of some organ's interpretation, which gives it a stabler foundation than an isolated innovation, but it is at the same time a source of tension for the High contracting Parties which are little prone to submit to the influence of systems they do not belong to.

The Inter-American Court was the first to make its conception of a universal *corpus iuris* of human rights its hallmark. It has indeed considered for a long time that the American Convention is an integral part of a broader normative system the only aim of which is the protection of the human person.[14] Judges would then have the possibility to freely 'pick and choose' from that normative set, which includes the case law of specialised bodies working together towards a final objective. That systemic integration pushed to extremes is realised in a process of *pro homine* interpretation which is characteristic of the Inter-American Court. That is what allowed it for example, on the occasion of the important *Villagran Morales* case, to consider that the American Convention and the New York Convention on the rights of the child – which was outside its regional system – were part of the same *corpus juris* on the protection of children, which in turn gave it the possibility to fill in the content of the first based on the provisions of the second.[15] Although each text offers specific foundations for this approach and though it is practised differently by each court, it is generalised today. While the African approach is the most recent one, the European has been the timidest. However, it is comfortable with its openness today, as shown in the recent case *Fedotova v. Russia*[16] in which, in order to support a position on the legal acknowledgement of same-sex couples that was already recognised in Europe, it referred to the opinion of the Inter-American Court on gender identity, equality and non-discrimination against same-sex couples as a vehicle of additional legitimacy.[17]

Consequently, and beyond the specificities of each system, the author emphasises the common within the singular, which are reconciled through this fortunate de-compartmentalisation.[18] It is at the same time a means to bypass the obstacle of the usual dialectics which opposes universalism and regionalism and/or relativism. By admitting that unity within diversity, the de-compartmentalised approach offers a third path which also has consequences on the institutional level.

13. G. Guillaume, 'Multiplication des instances judiciaires internationales: perspectives pour l'ordre juridique international', *Discours du Président de la Cour internationale de Justice prononcé devant la Sixième Commission de l'Assemblée générale des Nations Unies*, 27 octobre 2000.
14. *'Street Children' (Villagran-Morales* et al.*) v. Guatemala*, Judgement, Inter-American Court of Human Rights, Series C No. 63, §194 (19 November 1999) (Merits).
15. *'Street Children' (Villagran-Morales* et al.*) v. Guatemala,* Judgement, Inter-American Court of Human Rights, Series C No. 63, §194 (19 November 1999) (Merits).
16. *Fedotova and others v. Russia*, ECHR, Judgment (Grand Chamber) of 17 January 2023 (application N[os] 40792/10, 30538/14 and 43439/14) § 176.
17. *Gender identity, and equality and non-discrimination of same-sex couples*, Advisory opinion OC-24/17, Inter-American Court of Human Rights (24 November 2017).
18. 293ff.

B. Institutional de-compartmentalising: the dialogue of regional courts

The interpretative dialogue which is highlighted in the second part of the book has progressively woven institutional links between the three courts which the author instils throughout the text and which nurture a global movement of de-compartmentalisation within international human rights law.

First, Laurence Burgorgue-Larsen reveals the background to the establishment of meetings among regional judges. Many lessons can be drawn from that first-hand tale of the progressive institutionalisation of the links among judges since it allows to measure their progressive familiarisation to the ‘other’, which renders continental isolation impossible. From its informal beginning at the Declaration of San José in 2018, which formalised the creation of a permanent forum of institutional dialogue between the three courts, the story of that intercontinental connection shows the opening up of the courts themselves. On the occasion of the first International Human Rights Forum in Kampala in 2019, the three courts adopted a Memorandum of Understanding aiming to deepen and strengthen the established institutional dialogue.

Then, that institutional opening was fostered by a substantial dialogue among the courts that it fed in its turn. The interpretative de-compartmentalisation which has already been highlighted at a normative level entails, on the institutional level, what Anne-Marie Slaughter calls ‘judicial globalisation’,[19] or the emergence of a ‘global community of courts’,[20] of which regional human rights law is the epitome. It is the realisation that courts ‘interact quasi-autonomously with other courts – national and international. They create information networks. (…) The result is a growing and overlapping set of vertical and horizontal networks that together establish at least the beginnings of a global legal system.’[21] That dialogue then establishes, among human rights judges, a real movement of cross-fertilisation and beyond it, the start of an international system of protection of human rights. That observation is in accordance with the intuition of Syméon Karagiannis according to whom ‘A fruitful dialogue among international judges placed, in theory, on the same level may come into existence. One’s boldness making the other bold themselves, “global” case law may have a good chance of adapting to circumstances which are increasingly changeable.’[22] It is indeed a technique with a strong evolutionary potential, since ‘The interactions among the norms are accompanied by a movement of the relevant *corpus* the ones in relation to the others.’[23] That ‘cross-breeding’[24] indeed implies exporting changes, developments and evolutions, in a circular relation among the regional courts of human rights.

Such institutional convergence does not erase the distinctive features of each system which is accounted for in detail. That comparative analysis ventures sometimes up to the boundaries of the judicial sociology of the men and women who have marked those systems, whose portraits are written along the developments, and who have exercised a crucial influ-

19. A.-M. Slaughter, ‘Judicial globalization’, (1999-2000), vol. 40, *Vanderbilt Journal of International Law* 1103-124.
20. A.-M. Slaughter, ‘A global community of courts’, (2003), vol. 44, N° 1, *Harvard Journal of International Law* 191-219.
21. A.-M. Slaughter, *A new world order* (Princeton University Press 2005) 69.
22. S. Karagiannis, ‘La multiplication des juridictions internationales: un système anarchique?’ in S.F.D.I., *La juridictionnalisation du droit international* (Pedone 2003) 153.
23. S. Turgis, *Les interactions entre les normes internationales relatives aux droits de la personne*, *Les interactions entre les normes internationales relatives aux droits de la personne* (Pedone 2012) 506.
24. ibid.

ence – which has rarely been so clearly assessed as in those lines. The book finally offers a comprehensive reading grid of the institutional diversity of the three systems based on multiple explanatory factors integrating the geopolitical[25] and diplomatic context,[26] the institutional choices,[27] the list of protected rights,[28] and the relation with the States parties[29] and non-State actors.[30] That overview shows the merits of the defended thesis according to which those phenomena are not fundamentally different nor exactly identical, but are manifestations adapted to different contexts, necessities, stories and cultures. Here again the spectre of Eurocentrism fades away and an inclusive vision of court practice – which welcomes diversity without falling into relativism and resists the temptation of making one of the objects of the study a model – emerges.

The comparative approach of the institutional aspects also reveals that the issues that regional judges face are recurrent. While State distrust is a general phenomenon the workings and stakes of which have been under the spotlight for some years now, that of the nomination of judges is more rarely described. From a detailed analysis of the statutes and practices of each court, the author emphasises, without using doublespeak, a recurring important loophole in the very composition of those bodies linked to the mode of recruitment of their main actors, which derives from the persisting discretionary power of the State in the process. Though the Inter-American and African systems value expertise, few indications are given as to the modes of designation of the candidates, which leaves ample room for friendship and political relations. The European system claims it is transparent but does not really manage to be so. French practice is not an exception. Indeed, while many countries alternatively choose among judges and university professors to take national positions on international courts, France continues, except in a few cases,[31] to exclusively nominate judges who are closely connected to the Ministry of Foreign Affairs and/or *Conseil d'État*. *Le Monde* newspaper revealed the fraud disguised as a national selection which always led to the alternative appointment of a member of the *Conseil d'État* and the *Cour de Cassation*. Those internal machinations inevitably allow a lingering doubt as to the independence and impartiality of the nomination process and, even more prejudicial, as to the degree of expertise of the selected candidates.

Finally, the last title of the book, which deals with the application rather than the execution of law and case law, shows that institutional de-compartmentalisation by highlighting the development of multiple synergies. The respect of treaty rights and court decisions is indeed the result of the joint action of several actors who are often left aside or considered separately. The *tour de force* of those developments lies in the connection of the different strategies at play which include not only the regional court/national authorities dynamic but also the action of non-State actors like NGOs, diplomats and the academic world. The author even analyses the mechanisms of the national coordination of the execution of the decisions and here again draws a complete map of it, to the slightest detail of the phenomena under study. Thus, 'It is a whole in which the main institutions of the regional systems, the constituted powers of the States, the national human rights institutions and the actors of

25. 22ff.
26. 43ff.
27. 119ff.
28. 167ff.
29. 278ff and 373ff.
30. 415ff.
31. Which were not really exceptions, since the rare academics who filled those positions also had a political stature – like Suzanne Bastid, René Cassin, Pierre-Henri Teitgen or more recently Jean-Pierre Cot.

civil society are all concerned and connected, in varying degrees, and aim to reach the efficient and fast implementation, marked by a spirit of loyal cooperation, of the decisions of the regional courts of human rights.'[32]

II. De-compartmentalising the doctrine

Beyond the analysed institutions and practice, the scope of the book is broader than its object of study or even international law itself. Indeed, the chosen approach is that of unapologetic pluralism (A.) which shows the integration of different criticisms, especially post-colonial ones, both of international law and the doctrine (B.)

A. A pluralistic approach of international human rights law

As has already been said, the author announces in the introduction that she is aware that her discourse is necessarily situated.[33] That awareness and the precautions which surround the reflection to leave aside the possible intellectual biases linked to an origin or to the belonging to a doctrinal analysis are the very condition of a truly comparative approach. They place the book within a pluralistic movement which implies a decentralisation from Europe which is especially important for today's international human rights law.

To start with, it may be appropriate to remember that the legal doctrine, as a discourse on the law, and like any discourse, is necessarily located. Impregnation by social sciences has allowed to reveal the myth of its neutrality and to replace it within its social, historical, ideological and even political context.[34] A universalist and homogeneous perception of the discourse on the law clashes with 'epistemological nationalism', described in particular by Anne Peters as the adoption of positions linked to the initial training of the authors and the interests of their national States,[35] which is revealed in the completely diametrically opposite analyses that jurists from different traditions make of the same international facts.[36] The diversity in the points of view on the same topic has led some researchers to question the international nature of international law given how different its understanding and analysis are depending on the contexts.[37] The change from a philosophy of knowledge centred on the subject to a philosophy centred on language at the end of the 19th and beginning of the 20th centuries, in particular following Ludwig Wittgenstein's work,[38] triggered the 'linguistic turn'. That movement which appeared in social sciences before the science of law, revealed the mediatory function of language and the extent to which it conditions and

32. 371.
33. 19.
34. See in particular M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).
35. A. Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus [The Future of Public International Law Scholarship: Against Epistemic Nationalism]', (2007) vol. 67, *Heidelberg Journal of international law* 721.
36. Emmanuelle Jouannet notes on that topic that 'In reality, internationalists are always sensitive to the way international law is applied in and by their own country and thus can, unconsciously or not, favour the external national policies of their State in its perception of the law', E. Jouannet, 'Regards sur un siècle de doctrine française du droit international', *op. cit.*, p. 4.
37. See in particular A. Roberts, *Is international law international*, Oxford (OUP 2017).
38. *Id.*, 545.

structures the relation with the world. It becomes a favoured access to facts, in contradiction with the 'given' fact that the science of law must only describe, according to the positivist approach. That linguistic turn was at the origin of what is collectively called 'pragmatic approaches' of the law, which, despite their diversity, share a perception of the law as an act of language or communication. The deconstructivist approach of the American critical legal studies, which was adopted following the observation of the indeterminacy of the law as a language in line with legal realism, has the same origin. All those shifts of the analysis of the law allow to refine yet again the understanding of the doctrine as a discourse. It is logical that, like law itself, it conveys values, a system of beliefs or at least to acknowledge that it is necessarily situated. Those theoretical advances lead to consider the doctrine as a complex discourse object, which conveys some stereotyped or presumed biases that reveal a situated point of view.

It was based on the assumption of the located character of the law and of the discourse on the law that the observation of its Eurocentrism progressively appeared. That observation seems to have been built from the controversy on the origins of international law and then to have become the proposal of an alternative epistemological framework to the universalist claims of international law and its science. Indeed, the history of international law has long been marked by a Eurocentric paradigm.[39] In those conceptions, the birth of international law is perceived as a European phenomenon which appeared in the 16th century and was rooted in the history, culture and values of that part of the world. Its expansion in the following centuries eventually allowed it to declare it was universal, which it continues to claim today.[40] Some challenge of the more 'European' than 'international' nature of that legal order were already present in the regionalist claims of the beginning of the 20th century, as in the plea of Alejandro Alvarez in favour of an American international law.[41] Contemporary authors from very different theoretical movements and legal traditions have started to dismantle that Eurocentric historiography of international law over the past decades, and have highlighted the incomplete nature of that narrative.[42] Many have indeed shown that that vision tends to exclude the many non-European historical experiences,[43] and to convey a certain Western bias, which then irrigates the normative structure of the legal order. Finally, based on those factors, it becomes obvious that the proclaimed universality of the doctrinal discourse on international law also hides the different local prisms

39. Eurocentrism is defined by American sociologist William Graham Summer as 'this view of things in which one's own group is the center of everything, and all others are scaled and rated with reference to it.' <https://www.gutenberg.org/files/24253/24253-h/24253-h.htm> accessed 9th April 2023, W. G. Summer, *Folkways*, Boston, Ginn and co, 1906, p. 13. See also V. Genin, 'Eurocentrisme et modernité du droit international, 1860-1920', 2018, vol. 2, N° 14, *Monde(s)* 199-221.

40. See in particular A. Becker Lorca, 'Eurocentrism in the history of international law' in B. Fassbender, A. Peters (eds), *The Oxford handbook of the history of international law*, Oxford (OUP 2012) 1036.

41. A. Alvarez, *Le droit international américain, son fondement, sa nature, d'après l'histoire diplomatique des Etats du Nouveau Monde et leur vie politique et économique* (Pedone 2010).

42. See in particular B. Fassbender, A. Peters, 'Introduction: towards a global history of international law' in B. Fassbender, A. Peters (eds), *The Oxford handbook of the history of international law*, Oxford (OUP. 2012) 2-25; N. Tzouvala, 'The specter of Eurocentrism in international legal history', (2021) vol. 31, *Yale Journal of Law and the Humanities* 413; A. Becker Lorca, *Mestizo international law: a global intellectual history, 1842-1933* (CUP 2014); M. Koskenniemi, 'Dealing with Eurocentrism', (2011) vol. 19, *Rechtsgeschichte* 152-76.

43. See in particular R. Kolb, *Esquisse d'un droit international public des anciennes cultures extra européennes* (Pedone 2010).

which unavoidably condition the internationalist jurists' understanding of their object of study.[44]

That awareness has led to several projects of decentralisation of international law to overcome its Eurocentrism. One of them was to rewrite a global or globalist history of international law,[45] another was to view Europe as 'exotic' or as a 'province', in order to make it one of the places of international law among others,[46] or to make the history of international law plural to include the participation of non-European States and people,[47] or to hybridise concepts to take into consideration the adaptations they undergo when they are transposed to different contexts.[48] The common denominator in all those proposals was the acknowledgement that international law was plural and the adoption of a comparative approach to account for its diversity. Martti Koskenniemi considers that the comparative approach allows to take into consideration the plurality of the field of international law and of the discourse on it by admitting the local approaches defended by jurists and supported by a great variety of cultural and professional biases.[49] That approach meets the '"located" global approach' that Dzovinar Kévonian and Philippe Rygiel are calling for as it 'can usefully reintegrate practices and paths in the construction of a transnational history of internationalist jurists, by pointing at some places and social processes as points of observation of a refracted vision'.[50]

It is precisely within this movement that the approach of the author is situated throughout the book. It is a striking example of what the pluralisation of research which today seems necessary may be. Nowhere is to be found the primacy or admiration of one regional system over the others. Never, above all, is one of them presented as a model. The historical precedence of the European Court, the dynamism of the Inter-American Court or the hope the African Court is the bearer of are admitted as facts, without the famous European bias showing through. As formulated by Makane Mbengue '[P]luralizing the epistemic structures that privilege the past and present production and reproduction of Eurocentric international law is not a task that is limited by time. Not one research, or body of research will completely bring to realisation the transformation that critical scholars of international law seek.'[51] However, the intellectual discipline and ethics of European authors – like those evidenced by Laurence Burgorgue-Larsen in this book – as well as the multiplication and diffusion of that type of work allow to hope for a transition which might be softer than that which is called for by the supporters of the critical theories, but which will probably also be more lasting.

44. See in particular C. Focarelli, *International law as a social construct: the struggle for global justice*, *op. cit.*, 136: 'If international law is socially constructed this construction is the combination and the result of a variety of very different perception, each of which have a different weight in the end result.'
45. B. Fassbender, A. Peters (n 42).
46. N. Tzouvala (n 42); D. Chakrabarty, *Provincializing Europe: postcolonial thought and historical difference* (Princeton University Press 2008).
47. M. Koskenniemi (n 42) 172.
48. *Id.*, 173.
49. V. M. Koskenniemi, 'The case for comparative law', (2009), vol. 20, *Finnish Yearbook of international law* 1-8.
50. D. Kevonian, P. Rygiel, 'Introduction. "Faiseurs de droit": les juristes internationalistes, une approche globale située', (2015) *Monde(s)* 9.
51. M.M. Mbengue, O.D. Akinkugbe, 'Countering and pluralizing the research, teaching, and practice of eurocentric international law' in A. van Aaken, P. d'Argent, Lauri Malksoo, J.J. Vasel (eds), *The Oxford Handbook of international law in Europe*, Oxford (OUP 2023).

B. Responding to the postcolonial criticism of international human rights law

On the edge of the criticism of Eurocentrism appears a second, more radical one. Indeed, the acknowledgement of the plurality and non-neutrality of the doctrinal discourse on international law allows to question those divergences and the power relations that inhabit them. Taking into account differences in points of view leads for example to highlighting, as Anthea Roberts does, that '[F]or lawyers in certain powerful Western States, international law often involves the export of domestic concepts, so they do not experience a strong disconnect between the local and the international. By contrast, international lawyers in other states are much more likely to be aware of this disconnect and to experience international law as a foreign, imported – and possibly illegitimate – construct.'[52]

The postcolonial criticism of international law has been built on those theoretical premises and the fights led by the first Third-World theories in the 1960s at a time of big waves of decolonisation. The objective of that first approach, which was mainly embodied by French-speaking African authors,[53] was to assert the interests of newly independent States of the First World for them to be integrated into the existing legal order on an equal footing. Those theories therefore assumed both the concept of sovereignty and that of the universality of international law from which they hoped they would simply be adapted to the particular situation of the Third World, including for example the advent of a new international economic order,[54] the redefinition of the use of force to include the economic pressures exerted by developed countries or the promotion of permanent sovereignty over natural resources. The second wave of Third-World approaches, called TWAILs, (*Thirld-World Approaches of International Law*) tackled the construction of a truly radical criticism of international law and its doctrinal discourse. Originating at Harvard in the 1990s and composed of English-speaking jurists, that movement was defined in its 'Vision Statement' as a 'network of scholars engaged in international legal studies, and particularly interested in the challenges and opportunities facing "Third-World" peoples in the new world order'.[55] In line with American legal realism and the movement of the critical legal studies, they challenged positivism on destructuralist foundations and especially the assumption of the indeterminacy of the law, to denounce the persistence of underlying colonial values. Among their main topics were the centrality of the colonial phenomenon in the construction of international law and the challenge of the State-centred perspective of international law.[56] They were different from the first Third-World approach wave in that their objective was no longer to integrate the international legal order but to deconstruct it and conduct an in-depth questioning of its foundations – especially of the concepts of sovereignty and equality that govern it. Their members denounced in that respect the universalist claims of

52. A. Roberts (n 37) 11.
53. See for example M. Bennouna, *Droit international du développement* (Berger-Levrault 1983); M. Benchickh, *Droit international du sous-développement* (Berger 1983); M. Flory, *La formation des normes en droit international du développement* (CNRS 1984).
54. See in particular M. Bedjaoui, *Pour un nouvel ordre économique international* (Unesco 1979) 136.
55. The *TWAIL Vision Statement* from those meetings is available in J. T. Gathii, 'Alternative and Critical. The Contribution of Research and Scholarship on Developing Countries to International Legal Theory', (2000) vol. 41, *International Law Journal* 263-75.
56. See for example A. Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge (CUP 2004).

a legal discourse which contributes to hiding the colonial values it conveys.[57] Unlike previous approaches, the TWAILs therefore built a criticism of the majority internationalist doctrine by considering, as Carlo Focarelli said, that '[T]he alienation of international law has produced an alienation of the discipline itself, with the dominant majority of international lawyers formalistically "not speaking on behalf of subaltern peoples"'. That domination would partly rely, according to several authors, on the ideological domination of Western institutions and publications, which would tend to be systematically reproduced.[58]

That criticism flourishes in the field of international human rights law. It is precisely the universalist claims of that branch of the law which are its stumbling block in that it would amount to imposing a dominating model to 'subordinates'. With that transposition a system of monocultural values would be imposed which would obviously raise issues of legitimacy. The movement of human rights in international law indeed originated from Europe at the end of the First World War and relied on ideals, projects and a cultural anchorage which were proper to that region. Then, its expansion beyond the European continent under the pretext of humanism would have acted as a pretext for the diffusion of a Eurocentric model conveying a Western liberal model in the rest of the world. The globalisation of human rights would then have favoured the domination of ways of thinking and societal objectives ill-adapted to the States born from decolonisation. That is what Bhupinder Chimni wants to illustrate with the example of the prevalence of civil and political rights following a neo-liberal orientation where economic, social and cultural rights lack efficiency though it is obvious that they are necessary to disadvantaged people.[59] Others go even further and see it as an instrument of the upholding of stereotypes with regard to non-European cultures. According to Makau Mutua, '[T]he language and rhetoric of the human rights corpus present significant theoretical problems. The arrogant and biased rhetoric of the human rights movement prevents the movement from gaining cross-cultural legitimacy.'[60] In order to demonstrate it, he develops the savage/victim/saviour metaphor. In that narrative, human rights are designed to save the non-European 'savages' and to put an end to the suffering of the 'victims' – who are also non-European – thanks to a 'saviour' – who is embodied by the developed States or the international institutions they control –, which legitimates for example some interventions today. Célestine Nyamu develops a slightly different argument but which belongs to the same order of ideas, according to which international human rights law participates in the stigmatising of Third-World cultures, the values, cultural practices or social representations of which are different from those of Western societies.[61]

Faced with those criticisms, the doctrinal approach that the author of *Les 3 Cours* adopts seems to be the adequate solution. Rather than a direct answer in the form of a participation in the debate on the decolonisation of international law and also on the decolonisation of knowledge, which is particularly criticised in France– where the postcolonial issue is obviously too sensitive to be tackled peacefully –, the legal and doctrinal pluralisation allows to remedy the shortcomings from which Western research and teaching may have suffered in

57. J. Gathii, O. Okafor, A. Anghie, 'Africa and TWAIL', (2010) vol. 18, *African Yearbook of International Law* 9-40; K. Ginther, 'Re-defining international law from the point of view of decolonization and development in African regionalism', (1982), vol. 26, Nº 1, *Journal of African Law* 49-67.
58. B. Chimni, 'Third World Approaches to International Law: A Manifesto', (2006) vol. 8, *International Community Law Review* 15.
59. *Id.*, 17.
60. M. Mutua, 'Savages, victims, and saviors: the metaphor of human rights', (2001) vol. 42, Nº 1, *Harvard International Law Journal*, p. 206.
61. C. Nyamu, 'How Should Human Rights and Development Respond to Cultural Hierarchy in Developing Countries?', (2000) vol. 41, Nº 2, *Harvard International Law Journal* 381-419.

the past. That type of book opens the path for a truly de-compartmentalised approach of knowledge, without any hierarchisation hidden under formal comparatism. Lastly, in that respect, what she brings to the study of international human rights law is considerable. The book is simultaneously realistic and optimistic, critical and benevolent, humble and important, at a time when, more than ever, the rights that used to be considered to have been secured for a long time are being challenged from all sides and on all the continents.

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Guido Alpa, *Il diritto di essere se stessi* (La nave di Teseo 2021) 333.

IDENTITY AS SELF-ASSERTION. THE AGE OF RIGHTS AND THE CHALLENGES OF POSTMODERNITY

Luca ***Vespignani****

§ 1. – From the social role of the members of a social community to the rights of the persons

The theme of rights is so absolutely central to legal-philosophical reflection that when the term 'age of rights' is being used to refer to the period coinciding with the consolidation of contemporary democratic regimes, it means that 'human rights, democracy, and peace are three necessary moments of the same historical movement: without recognised and effectively protected human rights, there is no democracy; without democracy, there are no minimal conditions for the peaceful resolution of conflicts. In other words, democracy is the society of citizens, and subjects become citizens when certain basic rights are recognised; there will be stable peace – a peace to which the alternative is war – only when there are citizens who no longer belong only to this or that state, but to the world'.[1] This happened at the end of a process which started from the individual States, reached its apex in the post-World War II constitutions and was projected into the international dimension, beginning with the 1948 International Declaration of Human Rights thanks to which a cosmopolitan idea of the human person and their dignity – which should be protected even in the very confrontations of the political organisation they belonged to – took root. It is possible to trace back the origin of that process to the epochal passage of the French Revolution, and then identify within it different generations of rights in a historically determined succession. In particular, 'Chronologically speaking, first came the rights of liberty advocated by liberal thought, where liberty was understood in the negative sense', then came social rights, which 'in their broadest dimension entered the history of modern constitu-

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1. N. Bobbio, *L'età dei diritti* (Einaudi 1992) VII-VIII.

tionalism with the Weimar Constitution',[2] up to the new rights of the most recent stages, which largely refer to the 'threats to life, liberty and security coming from the growth of technological progress'[3] and are increasingly the object, in turn, of formal constitutionalising, as recently happened in Italy with regard to the right to the environment, which was explicitly recognised with the reform of Articles 9 and 41 Const. carried out through the Constitutional Law February 11, 2022, No. 1.

Guido Alpa's intellectual path is set against this backdrop and, in order to reconstruct it, it is convenient to start from the end, that is, from the last sentence of the book, where the author states that 'Identity is neither a photograph nor a point of arrival: identity is an instrument that from time to time can fulfil a liberating or persecutory function. The level of civilisation of a society is given by the extent to which it is able to guarantee to everyone the right to be themselves'.[4] This is how we express in icastic and synthetic form what can be considered as the key to reading a reflection that is conducted from a broad perspective but always through the lens of law, seen in its normative dimension so as to distinguish it from other social sciences – which are instead oriented towards grasping the reality of facts.

The first part of the investigation is a reconstruction of the development of the concept of 'person' over time. More specifically, it is observed that it used to be correlated to a specific social position in Roman law: 'father of the family, married woman, unmarried woman, adult child, minor child, slave, freedman, ie freed slave, citizen, foreigner, and so on'.[5] This structure continued throughout the Middle Ages and up to the *Ancien Régime*, acting as a vehicle for the privileges associated with the various statuses. And even when, after the French Revolution, the picture changed by virtue of the generalised recognition of the so-called 'human rights', privilege re-proposed itself in new forms, first and foremost on the basis of the centrality assumed by the right to property which, although abstractly guaranteed to everyone, 'differentiated individuals to the point of becoming one of the requisites for exercising the right to vote'.[6]

The decisive step came only with the approval of the 20th-century constitutions, in which the individual sphere was removed from the legislator's discretion and protected directly at the super-primary level of the hierarchy of normative sources. The consequence was that, 'In this context, the word "person" does not have the meaning used by the Romans, it acquires a more pregnant meaning. This is why it is usually said that with the post-World War II constitutions, the individual became a person, no longer an abstract concept, but a man or woman in the flesh, with his or her needs, aspirations, dignity and inviolable rights'.[7] In other words, whereas the idea in question was previously a tool to distinguish and value certain subjects, it now became a factor of equality, insofar as 'The role of law changed, and no longer consisted in consolidating differences to protect the privileged (…), but rather in guaranteeing inviolable (human or fundamental) rights to all, and recognising their identity'.[8]

From such a perspective, 'Identity is no longer constructed from each man's past, but looks at the present and the future, and becomes a choice and an opportunity',[9] being the

2. ibid 262-63.
3. ibid 267.
4. G. Alpa, *Il diritto di essere se stessi* (La nave di Teseo 2021) 298 (in the following text, this book will be referred to as *DES*).
5. ibid 12.
6. ibid 14.
7. ibid 15.
8. ibid.
9. ibid.

object, in turn, of a right to the full realisation and expression of one's way of being. Hence the problem is to unhinge discrimination, which 'concerns both the individual as an individual and the individual as a member of a community; but individual discrimination can also concern the individual within his or her own community',[10] also taking into account that the various discretionary criteria tend to combine, so that, for example, 'Sex is always combined with another criterion: with "race", skin colour, ethnic or social origin, genetic characteristics, and so on'.[11]

In that situation, the main element that brought about change was the enhancement and protection of fundamental legal situations. This was a phenomenon that evolved over a long period of time and one should bear in mind that 'The parable of rights crossed the nineteenth century and developed along with the cult of property rights, legitimising colonialism, which resorted, for a certain point of view, to the same arguments that Spanish jurists and theologians used in order to legitimise the conquest of the Indies'.[12] Moreover, the Enlightenment intellectuals themselves did not go so far as to prefigure the complete overcoming of the traditional order. Indeed, it is noted that Montesquieu did not fail to assign the nobility a fundamental function in the apparatus of government and that Voltaire downplayed the impact of the proclamation of the principle of equality, while Rousseau was more modern. The same approach is found – albeit with different nuances – in Filangieri and Bentham.

This cultural climate profoundly influenced the normative side, which borrowed its conceptual categories from it. In particular, 'In the two traditions, the French and the American, there was a succession of declaratory texts and texts organising society which had a "constitutional" value' and 'The revolutionary scope of these texts was given above all by the proclamation of rights'.[13] The first to come to light was the Declaration of Independence of the United States of America of 1776, followed by the Constitution of 1787, in which there was an articulate enumeration of fundamental rights, with the possibility of adding others by virtue of the Ninth Amendment. A few years later, the Declaration of Rights that marked the beginning of the French Revolution when it was adopted in 1789 was replaced first in 1793 by the Jacobin Constitution and then in 1795 by the Constitution that was approved after the period of the Terror. The Austrian system, in which rights were incorporated into the Civil Code, and common law, which is characterised by the lack of 'an organic framework to regulate the person',[14] followed a different path.

Conversely, constitutions approved as a result of the 1848 uprisings showed some regression compared to the results achieved in the 18th century. For example, in the Albertine Statute (1848) 'Human rights were ignored. There was no proclamation of human rights but only the declension of the rights and duties of the citizen',[15] although there was no shortage of cases in which a more modern approach emerged, starting with the French Constitution of 1848 and the Roman Constitution of 1849, where the privileges of birth or caste were explicitly rejected. Until, in keeping with the sequence outlined above, there was a decisive reversal of the trend in the contemporary constitutional charters, the paradigm of which, from this point of view, was the Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights of 1950.

10. ibid 25.
11. ibid.
12. ibid 53.
13. ibid 63.
14. ibid 69.
15. ibid 72.

§ 2. – A History of discrimination. Sex and race

It has been said that Alpa identifies discrimination as the antithesis of the right to full self-realisation and, in fact, 'If we look at the individual underlying the abstract configuration, we realise that man exists, that is, comes into consideration, only if he is distinguished from other men; and that distinctions between individuals are related to two fundamental factors: the natural factor and the social factor. The former is based on the conception of nature translated into the world of law, the latter depends on birth and takes into consideration man's natural condition (…). This is therefore the path to understanding the different meanings of "person", the way in which law builds the image and role of the person, the way in which law can be discriminatory or protective'.[16]

With regard to discrimination based on nature, Alpa first of all examines discrimination based on sex, pointing out the minority position in which the religions of the Book place the female component, while observing that 'The opposition between man and woman is a constant in the history of humanity, at any latitude and at any historical moment'.[17] This was a contraposition which started to be overcome in the context of the Enlightenment – with some forefront intellectuals as high-flying as Louise-Félicité de Kéralio and Olympe de Gouges – and continued into the 19th century in Italy under the impetus of Cristina di Belgiojoso and Anna Maria Mozzoni among others.

However, in the Napoleon Code, the approach remained rigidly male chauvinistic, given that 'The secular, bourgeois family model (…) thus corresponded to a "strong command structure" that was functional in 19th-century capitalist society'.[18] The Italian Code of 1865 also adopted the same position, so much so that it was not until 1919 that women became *sui juris* due to the abolition of marital power. This allowed them to have access to the profession of lawyer, while 'For the other professions, the notary and the magistracy, as well as for political representation, they had to wait for another few decades, not only because their entering the world of law was still met with hostility, opposition, cultural delays and petty limitations, but also because exercising the functions of a notary or magistrate meant carrying out a role of a public nature'.[19]

In the same way, discrimination based on 'race' was linked to nature, insofar as 'It is always something inherent in nature considered in its physical consistency and appearance that racists believe (or claim) to find in individuals who are characterised as different'.[20] The juridical condition of the Indios is considered by Alpa to be emblematic of the ongoing debate on the relationship with the other, but it probably finds its most tragically emblematic expression in the centuries-long persecution of the Jews, of which he briefly reconstructs some of its essential passages.

More specifically, once the exclusive reference to the physical sphere has been overcome, 'In the process of internalising the image of the person, man is considered to be endowed with sensitivity and reason, but also to be a representative of his species (…). And it is precisely the unity of spirit and body that is at the basis of the theory of human races, which is described metaphorically in the distinction between night/day/dawn/dusk, in which the daytime peoples are the Caucasian ones – who express the pinnacle of humanity –, the

16. ibid 43.
17. ibid 83.
18. ibid 89.
19. ibid 93.
20. ibid 107.

human quality gradually degrading as skin colour becomes darker'[21] – unless further support is found in evolutionary theories, which are invoked to justify the superiority of the white peoples over other peoples. This discourse is declined in the book as well, with reference to the history of slavery in the United States and to that of Italian colonialism, of which a synthesis is proposed focusing above all on legal implications.

§ 3. – From the bond to the land to the subject of law and to the 'new' rights of the Republican Constitution. Human dignity as the founding value of the whole system

Developing his reasoning on the 'right to be oneself', Alpa then deals with the bond to the land, placing it at the origin of that personal status, which is ascribable to the current notion of citizenship, whereby 'The person, wherever he may be, carries with him the rules that identify him as a human being, and as the holder of the personality rights that his system recognises'.[22] But the connection to a specific territory, in addition to a more strictly legal value, also has implications at the level of language, traditions, history and culture and thus leads back to the broader sphere of the nation, to which a further component of a spiritual nature is added.

Continuing his study of the sphere of distinctive signs, the author also dwells on the progressive assertion – from the early Middle Ages onwards – of the name as a connotative element, starting from the consideration that 'The surname was the result of the re-characterisation of the individual: the individual was no longer an amorphous monad in an anonymous crowd, but had his own personality expressed in his name. The name is a sign of freedom: it is no coincidence that the Italian Constitution, like other constitutional texts, recognises in the name an essential feature of the person, and protects the name as a fundamental right together with legal capacity (Art. 22)'.[23]

Along this line of development, the author examines the nineteenth-century notion of the 'subject of law', clarifying that man is called a subject of law 'not based on his ethical-psychological characteristics nor on his social relations, "but only by virtue of formal recognition by the legal system". The subject of law is "the point of subjective legitimation of legal consequences", and personality and capacity for legitimation are not qualities of the subject but the form and presupposition of all the juridical qualities that can be conferred on the person'.[24] In other words, there is an artificial creation, in favour of which the right to physical integrity, the right to a name and a pseudonym, and the right to the image – which concerns the physical image as reproduced by the new techniques of photography and cinema (Articles 5-10) –, were codified in Italy at the end of 1938 as absolute subjective rights of the person.

A first degree of guarantee was thus achieved, which was completed and enriched with the approval of the Italian Republican Constitution, which is rich 'in references to the per-

21. ibid 116.
22. ibid 127.
23. ibid 140.
24. ibid 151.

son as such (for which Articles 2, 3 and 22 apply) and in provisions that presuppose the "value of the person" and confirm the existence of a general principle aimed at protecting it (Articles 9, 13-27, 29-31, 33, 34, 35-40 and 41-54)'.[25] In particular, attention is focused on Article 2 of the Constitution, which offers a choice between a conception of the same which is a synthetic expression of all the subsequent provisions relating to individual constitutionally-sanctioned legal situations, and an open formula, which may lead on to the organisation of further values not explicitly referred to. Alpa adheres to an intermediate position, holding that 'Article 2 is an "open" text, interwoven with the values shared by the social conscience, intended to make the system "fluid", informed by a mild right and by the plurality of rights, which are subdivided into rights-claims and rights-opportunities'.[26]

Specifically, Articles 2 and 3 of the Constitution are identified as the matrix of the so-called 'new' rights, whereby 'Alongside legal capacity, physical identity and citizenship, have been created the right to privacy (…); the right to protection against the computerised collection of personal data; the right to personal identity (…); the right to sexual identity; the right to health (elaborated through the connection of these norms with Art. 32 of the Constitution) (…); the right to a healthy environment (developed by linking these norms to Articles 9 and 32 of the Constitution)'.[27] This is still work in progress, as it has recently also included the sphere of bioethics (reference is made to the right to preserve one's genetic heritage, the right to procreation, the right to the prevention of therapeutic measures). In all this complex universe of subjective legal situations, Alpa points to human dignity as the common denominator, recognising in it 'the essential element of the new conception of the person, a sort of "anthropology of the *homo dignus*", which connotes the way in which man must be considered as a bearer of values, protected therefore from threats to life, to health, and to freedom, and as an end, not as a means by other men'.[28] He adopts a functional conception of human dignity, understanding it in terms of a value which may be realised above all through the activity of the judicial bodies – which is briefly accounted for by tracing an outline of both the case law of the Court of Cassation and of the Constitutional Court, as well as that of the Strasbourg Court on the European Convention on Human Rights and of the Court of Justice of the European Union on the Nice Charter and the Lisbon Treaty.

§ 4. – The path of equality in differences

Against this theoretical backdrop, Alpa proceeds to a series of in-depth studies of some of the most controversial topics, starting with the protection of women – the evolution of which is rebuilt in the various spheres of social life, from work to the family – and the fight against discrimination in the sexual sphere – on which he conducts a wide-ranging reconnaissance that also includes the jurisprudence of the United States Supreme Court, since 'The United States is the country in which the rights of the different have been recognised as a priority' –[29] before providing a careful analysis of the regulations on civil unions that have been recently approved in Italy.

25. ibid 157.
26. ibid 158.
27. ibid 158-59.
28. ibid 165. See also S. Rodotà, *Il diritto di avere diritti* (Laterza 2013) *passim*.
29. Alpa, *DES* (n 4) 188.

Similarly, the issue of race is still a long way from finding a convincing solution, tackled in the book as it is above all from the perspective of hate speech, and with regard to which it is observed that 'In the Western world two extreme models of reaction can be briefly distinguished: the so-called European model, which is based on the balancing of fundamental rights and which therefore legitimises limitations on freedom of expression, and the so-called American model, which does not impose any limit on freedom of expression and considers that hate speech is legitimate precisely in the name of that freedom'.[30] This is confirmed by examining certain decisions of the Italian Supreme Court in which the right to express one's thoughts enshrined in Article 21 of the Italian Constitution – for example in the form of the right to criticism or satire or the right to inform – is balanced with religious sentiment or the right to honour, so that it is clear that 'In our system, freedom of expression cannot be considered at the top of a pyramid in which everything is permitted. In particular, the limit of the protection of personal values, which we could summarily define in terms of dignity, requires self-restraint'.[31] This is also reflected in the case law of the Strasbourg Court – although it has not defined hate speech – and of the Court of Justice.

Another issue that is dealt with is that of 'constitutionalised' personality rights, in the sense that, as far as Italy is concerned, in many cases they were first interpretatively derived from the Constitution – mainly from Article 2 –, unless they were subsequently recognised also in ordinary and European Union legislation. In such a scenario, the oldest is the right to privacy, which was born in the United States at the end of the 19th century with the doctrinal elaboration of Warren and Brandeis and was adopted in Europe in the second half of the 20th century, initially through case law, then through legislation, and ultimately through European Union regulation. However, the right to personal identity, which 'differs from privacy because the latter tends to protect the secrecy of private life, whereas the right to personal identity refers to the manifested aspects of personality' is more recent and differs from reputation, because the latter expresses a judgement and may concern true or false facts and data while the right to personal identity expresses the 'social projection of the personality',[32] linking it to the right to be forgotten, according to which the Court of Justice stated in the 2014 Google Spain judgment, 'The data subject is entitled to obtain the deletion of data found to be prejudicial, provided, however, that this does not sacrifice the public interest in information',[33] although for the time being there is no unambiguous orientation of the national courts on this point.

Nonetheless, the situations at the centre of the most heated debate are those relating to biological identity and sexual identity, which call into question values that are not infrequently conflicting, as is the case, for example, with assisted procreation and abortion or with transsexuality and gender questions, so much so that the same 'often plays an amphibious role, and the expression presents a semantic ambiguity'.[34] On this subject too, the book offers a succinct review of court cases which aims at understanding the most emblematic parts of a path that is still far from being completed.

Then, still on the same track, a chapter is devoted to digital identity which gives ample prominence to the work of Stefano Rodotà in his capacity as scholar, privacy guarantor, and legislator. In this regard, 'Three lines of development of personal data legislation progressively initiated by EU bodies are prefigured: i) one concerns the protection of data as an

30. ibid 204.
31. ibid 210.
32. ibid 228.
33. ibid 231.
34. ibid 239.

expression and image of the person, and therefore as a specification of the general right of personality, which was constructed in our model at the end of the 19th century on the basis of influences from French and German cultures; ii) another is about the construction of the data marketplace – data are an essential component of the digital market, from their circulation and hence the authorisation or consent of the person concerned, to their acquisition, processing and use – and also includes the ownership of databases set up by economic operators; iii) yet another relates to contracts having a digital content, among which data of a personal nature may be found'.[35] In particular, Alpa focuses mainly on the last line, illustrating the different orientations that can be found in the US experience – which is in any case marked by a conception favourable to the commercialisation of personal data by data controllers – and contrasts the latter with the European approach – in which the concern to protect the sphere of the individual is more prominent. 'It is possible for a complex of coordinated initiatives to take advantage of the proposals and rules already in force from the Union – the broad interpretation of Article 8 of the Charter of Fundamental Rights, the extensive qualification of the right to privacy, the enhancement of consent and withdrawal, and the strengthening of controls on the digital market – without arriving at the characterisation of the data-person relationship in terms of property'.[36]

Finally, after dwelling on the collective dimension of identity dynamics and related opportunities for discrimination – eg based on language, religion, political views, ethnicity, and more –, Alpa completes his overview with a digression on the concept of 'citizenship', ie on the determined element that defines the belonging to a specific State, which is currently at the centre of a heated debate on the management of large migratory phenomena that Italy and other countries are tackling in a not-always-straightforward way. In fact, there is an immigration law which is 'articulated on several levels and often inspired by logics that are not perfectly consistent with each other, which, depending on the sources involved and the historical context from which the measures in question originate, alternate the values of solidarity and respect for human dignity with the security paradigm of control and marginalisation of the "different"'.[37]

§ 5. – Some open questions

To put it in a nutshell, in Alpa's reconstruction, identity ceases to run to a hetero-attributed role to become a result at the disposal of the individual, who recognises himself as the holder of a *right to be himself*, a right that, on the one hand, implies the overcoming of any discrimination arising from identity criteria and, on the other, is realised thanks to the assertion of a series of prerogatives that can be traced back to the value of dignity. This results in a multiplication of subjective legal situations that are very often destined to collide with each other, as the book highlights in the case of the freedom of thought manifestation that becomes a vehicle for hate speech.

35. ibid 259-60.
36. ibid 266.
37. ibid 290.

Consequently, the problem is to ensure their orderly coexistence, and in this regard the most widely accepted answer to date points to balancing interests[38] as the tool to be used in priority over any alternative criterion – for example one aimed at finding some form of hierarchy between the different positions involved.[39] However, this opens the way to further questions, starting with the one about the rate of discretion inherent in such operations. In fact, the factors to be balanced not infrequently present a high degree of vagueness and this circumstance does not escape Alpa, who on several occasions points out the vagueness of some provisions and especially of the concept of 'dignity', which can sometimes be invoked in support of possibly conflicting objectives. This is particularly relevant in view of the driving function attributed to national and supranational courts as both the necessary interlocutors of parliaments and their substitutes when looking for a balance between the needs involved.

More generally, it is the logic underlying Alpa's entire argument – which sees the recognition and guarantee of rights as the core of contemporary legal experience – that has come under criticism from those who have spoken in this regard of a 'theology of rights'. This theology of rights would be 'fundamentally anti-democratic because it merely recognises a freedom from the State (reduced to nothing) and does not raise the issue of freedom of participation except rhetorically; indeed, participation is nullified as a problem the moment law is satisfied with its own being as such, a mere form considered as a reflection of its own sovereign absoluteness. Political rights as a prerequisite and condition of any other possible (civil, social, economic, etc.) discourse on rights disappear as they are absorbed by an individualistic and disruptive rhetoric taken to the extreme'.[40] So that 'Legislation is no longer relevant: there are, on the one hand, rights, which are greedy, expansive, multiplying at the planetary level, and, on the other, their authentic doctrinaires and interpreters, the judges, with their reference philosophers. In between is a so-called "executive" that is forced to govern by actually legislating, in a general confusion'.[41]

38. ibid 275, 290. See also on the topic of balancing, R. Bin, *Diritti e argomenti* (Giuffrè 1992); more recently, A. Morrone, *Il bilanciamento nello Stato costituzionale* (Giappichelli 2014); G. Pino, *Diritti e interpretazione* (il Mulino 2010), 173ff; R. Bin, 'Ragionevolezza e bilanciamento nella giurisprudenza costituzionale (con particolare attenzione alle più recenti sentenze in tema di licenziamento illegittimo)' (2022) 18 Lo Stato 257.
39. This refers to the position according to which 'The contrast between the interests involved in the new rights (so-called freedom rights) and the values inherent in freedom rights in the proper sense, on the one hand confirms the diversity between the two categories and the probable irreducibility of one to the other, and, on the other, poses the problem of identifying a general criterion that, at least as a guideline, allows the aforementioned contrast to be resolved in a given sense. I wonder whether the search for such a principle should or could take place following the implications of Bobbio's recent considerations. Bobbio first of all emphasises that "The liberal State is the presupposition – which is not only historical but also juridical – of the democratic State"; secondly, he specifies that the traditional rights of liberty, as the typical and essential nucleus of the liberal State, are in a certain sense superior and precedent to the same principles of the democratic State' (S. Fois, '"New" rights of liberty' in A. Vignudelli (ed), *Idem, La libertà di informazione* (Maggioli 1991) 451).
40. A. Carrino, *La costituzione come decisione* (Mimesis 2019) 293. Still with reference to the holding of the democratic principle but in a partially different perspective, cf F. Cortese, *L'identità furiosa e il diritto pubblico* (Mucchi 2023) 50 who observes that 'It is, more generally, a movement that, from above as well as from below, breaks the cords of "old-fashioned" citizenship, because it aspires to regulate the realisation of certain utilities according to ways that are not traceable to the traditionally centripetal core of political-representative circuits and the normative systems to which they give rise. In doing so, such a movement also casts doubt on the boundary as an institution capable of delimiting collective identity and, through it, also involving the formation of individual identity, untethered from the typical and fruitful hybridisation of democratic society'.
41. Carrino (n 40) 302.

But even without the challenge being of 'systemic' scope, it is observed that 'The language of rights is the idiolect through which to advance claims and demands in the public arena if one wants both to have any chance of being accepted. To paraphrase Jon Elster, one might regard the pervasive use of the language of rights as an emblematic case of that "civilising force of hypocrisy" that leads us to disguise our particular interests as universal reasons'.[42] In the face of the individualistic atomisation inherent in postmodernity, which entails, among other things, the deliquescence of the traditional concept of citizenship,[43] the recovery of a collective dimension of civil coexistence is considered, reflecting the conviction that 'The reassertion of an objective and widespread civic recognition is a central aspect in the transformations that the legal system has undergone in recent decades and is as heartfelt a need as that related to the proliferation of identities. The whole debate on the commons, horizontal subsidiarity and active citizenship as a resource for models of shared administration is a very eloquent and luminous indicator of this'.[44]

The outcome of such an order of remarks is to prefigure the 'end of the age of rights', and this expression is used 'in a deliberately neutral way, to indicate the end of one paradigm of organisation in favour of another, as well as the widespread awareness, in society, that this has happened and that going back is now quite difficult if not impossible'.[45] However, caution must be exercised lest this also meant the end of rights, which, according to Bobbio's scheme that was evoked at the beginning, are the basis of democracy – which in turn is considered a sine qua non condition of peace. In other words, care must be taken that the course correction with respect to the former, instead of freeing the political process from a distorted way of conceiving them, does not trigger dynamics divergent from the democratic idea delivered to us by the history of the last two centuries without putting in place alternatives that are equally structured and already immediately operational. This could also have possible consequences on the third side of the triangle as well, since, despite the fact that the rhetoric of rights has certainly not been particularly effective in opposing wars,[46] at times even providing justifications for them that are questionable to say the least – especially today, almost eighty years after the conclusion of World War II, in the presence of an

42. A. Schiavello, *Ripensare l'età dei diritti* (Mucchi 2016) 59.
43. In this sense, it is noted that 'The affirmation of certain freedoms (as are, in the European case, those of the internal market) and the entrenchment of economic globalisation (on an even larger scale) have largely cooperated for the fragmentation of the established and aggregating idea of legal identity in favor of overlapping and virtually disaggregating instances of identity. And it is equally true that, within this framework, not only businesses, but all subjects of law, activated in that competitive dynamic, have been placed in a regime of open competition and, for that reason, are set in turn as the antithesis of the public powers, territorial institutions and political communities that legitimise them' (Cortese (n 40) 53).
44. Cortese (n 40) 62-63. More specifically, as far as the Italian legal system is concerned, emphasis is placed on Articles 2, 3 and 5 of the Constitution, which 'from this perspective – with their very strong reminders of the personality that is also built in social formations, the equality that is realised in participation and the autonomy that is appreciated in the method of operation of all institutions – can still say a great deal about how Italian public law, which, although is in a state of transition (along with the many transformations of the present time), is able to face the very dangerous challenges of individual and collective identity fury' (ibid 64).
45. Schiavello (n 42) 62.
46. In this regard, it is noted that the abuse of the language of rights and their rhetoric 'offers a further exemplification – one that is perhaps dramatically more iconic – of both those who claim the international protection of rights as a justification not only for the war in Kosovo but also for the wars in Afghanistan and Iraq, and of those who, symmetrically, in order to deny the legitimacy of these wars, do not reject the plausibility of their "humanitarian" justification, but, paradoxically endorsing it, take the doctrine of fundamental rights and its alleged military implications as the target of their criticism' (T. Mazzarese, 'Minimalismo dei diritti: pragmatismo antiretorico o liberalismo individualista?' (2006) 1 Ragion pratica 186).

ongoing conflict within European borders – peacekeeping appears to be an absolute priority objective.

These are some of the knots to be unravelled that still underlie the reasoning outlined so far. The author of *The Right to Be One's Self* is obviously aware of them and overcomes them in the name of his confidence in the propulsive force of rights. The test of such an approach will be its ability to produce, over time, a positive-sum outcome in favour of citizens as a whole and consistent with the democratic matrix of our constitutional system, which remains, however, an inescapable fact.

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